

1 Andrew H. Wilson, SBN #063209
WILSON, RYAN & CAMPILONGO
2 115 Sansome St., 4th Floor
San Francisco, California 94104
3 (415) 391-3900
Telefax: (415) 954-0938

4 Laurie J. Bartilson, SBN #139220
5 MOXON & BARTILSON
6255 Sunset Boulevard, Suite 2000
6 Hollywood, CA 90028
(213) 960-1936
7 Telefax: (213) 953-3351

8 Attorneys for Plaintiff
CHURCH OF SCIENTOLOGY
9 INTERNATIONAL

RECEIVED
JAN 23 1995
HUB LAW OFFICES

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF MARIN

13 CHURCH OF SCIENTOLOGY) CASE NO. 157 680
INTERNATIONAL, a California not-)
14 for-profit religious corporation,)
15) [CONSOLIDATED]
16)
17) DECLARATION OF LAURIE J.
18) BARTILSON IN SUPPORT OF
Plaintiff,) CHURCH OF SCIENTOLOGY
19) INTERNATIONAL'S EX PARTE
vs.) APPLICATION FOR AN ORDER
20) STRIKING ARMSTRONG'S LATE-
21) FILED SUPPLEMENTAL
22) DECLARATION IN OPPOSITION
23) TO PLAINTIFF'S MOTION FOR
GERALD ARMSTRONG; DOES 1 through) SUMMARY ADJUDICATION OF THE
24) FOURTH, SIXTH AND ELEVENTH
25) CAUSES OF ACTION OF SECOND
26) AMENDED COMPLAINT, OR, IN
27) THE ALTERNATIVE, FOR AN
28) ORDER SEALING EXHIBITS A
AND M TO SAID DECLARATION
29)
30) DATE: January 23, 1995
31) TIME: 9:30 a.m.
32) DEPT: 1
33)
34) TRIAL DATE: May 18, 1995

1 LAURIE J. BARTILSON deposes and says:

2 1. My name is Laurie J. Bartilson and I am one of the
3 attorneys responsible for the representation of the Church of
4 Scientology International in this action. I have personal
5 knowledge of the facts set forth in this Declaration and could
6 competently testify thereto if called as a witness.

7 2. On January 19, 1995, at the close of the business day,
8 I received, by telefax, a copy of a document titled "Armstrong's
9 Supplemental Declaration in Opposition to Scientology's Motion
10 for Summary Adjudication of the Fourth, Sixth and Eleventh Causes
11 of Action of Second Amended Complaint." The declaration listed
12 14 exhibits, but none of them were attached. The declaration
13 also had attached to it a proof of service, claiming that the
14 declaration had been served on me, but not my co-counsel, by mail
15 on January 19, 1995.

16 3. Shortly after I received the telefax, I telephoned the
17 offices of Ford Greene. The telephone was answered by a machine.
18 I left a message for Mr. Greene, asking him to telefax me
19 immediately the exhibits which he referenced in the declaration,
20 and reminding him that the Church's reply was due to be filed the
21 next day. Mr. Greene did not return my call that night, nor did
22 he fax me the exhibits.

23 4. On January 20, 1995, I again called Mr. Greene's
24 office. This time he took my call, and told that he would fax me
25 the exhibits right away. I received them at approximately 3:00
26 p.m.

27 5. During my telephone conversation with Mr. Greene, I
28 told him that I would be appearing on Monday, January 23, 1995,

1 in Department 1 of this Court, to make this ex parte application.
2 He stated that my co-counsel, Mr. Wilson, had already given him
3 notice.

4 6. Because of the late service of these documents, I was
5 unable to incorporate any reference to them into the Church's
6 reply.

7 7. Attached hereto and incorporated herein are true and
8 correct copies of documents submitted as exhibits in support of
9 the Church of Scientology International's Ex Parte Application :
10 Exhibit A: Order of October 20, 1994 in this action;
11 Exhibit B: Excerpts from the book, What is Scientology?,
12 pages 222 - 223.

13 8. Attached hereto for the Court's convenience are copies
14 of the following federal cases:

15 Exhibit C: Bridge Publications, Inc. v. Vien (S.D.Cal.
16 1993) 827 F.Supp. 629;
17 Exhibit D: Religious Technology Center v. Scott (9th
18 Cir. 1989) 869 F.2d 1306;
19 Exhibit E: United States v. Hubbard (D.C.Cir. 1980) 650
20 F.2d 293.

21 I declare under the penalty of perjury under the laws of the
22 State of California that the foregoing is true and correct.

23 Executed this 23rd day of January, 1995 at _____,
24 California.

25 _____
26 Laurie J. Bartilson
27
28

1 Andrew H. Wilson SBN 063209
 2 WILSON, RYAN & CAMPILONGO
 235 Montgomery Street
 Suite 450
 3 San Francisco, California 94104
 (415) 391-3900
 4 TELEFAX: (415) 954-0938

5 Laurie J. Bartilson SBN 139220
 BOWLES & MOXON
 6 6255 Sunset Boulevard, Suite 2000
 Hollywood, CA 90028
 7 (213) 463-4395
 TELEFAX: (213) 953-3351

8
 9 Attorneys for Plaintiff
 CHURCH OF SCIENTOLOGY
 INTERNATIONAL

FILED

OCT 25 1994

HOWARD HANSON
MARIN COUNTY CLERK
BY: E. Keswick Deputy

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 11 FOR THE COUNTY OF MARIN

12 CHURCH OF SCIENTOLOGY
 13 INTERNATIONAL, a California not-
 14 for-profit religious corporation,

Plaintiff,

vs.

19 GERALD ARMSTRONG; DOES 1 through
 20 25, inclusive,

Defendants.

) CASE NO. 157 680
)
) [PROPOSED] ORDER
) CONCERNING MOTIONS FOR
) SUMMARY JUDGMENT

) TRIAL DATE: September 29,
) 1994

RECEIVED

SEP 15 1994

HUB LAW OFFICES

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 This matter came on for hearing on September 9, 1994, on
2 motion of plaintiff Church of Scientology International
3 ("Church") for Summary Judgment on Gerald Armstrong's Cross-
4 complaint, and on motion of defendant, Gerald Armstrong
5 ("Armstrong") for Summary Judgment or, alternatively, Summary
6 Adjudication on the Church's Complaint. Church appeared by its
7 attorneys, Andrew H. Wilson of Wilson, Ryan & Campilongo and
8 Laurie J. Bartilson of Bowles & Moxon, Armstrong appeared by his
9 attorney, Ford Greene. Having read and considered the moving and
10 opposing papers, and the evidence and arguments presented therein
11 and at the hearing, and good cause appearing:

12 IT IS ORDERED:

13 1. The motion of plaintiff/Cross-defendant Church of
14 Scientology International for summary judgment on the cross-
15 complaint of Gerald Armstrong is GRANTED.

16 2. Armstrong's claim based on the Miscavige declaration is
17 barred by the absolute judicial privilege of Civil Code Section
18 47, Subdivision (b). The declaration was provided in a judicial
19 proceeding. (See Second Amended Cross-Complaint, ¶69.) The
20 communication was made by a participant authorized by law
21 (Undisputed Fact 7). Contrary to Armstrong's argument, the
22 communication was made "to achieve the objects of the litigation:
23 and has "some connection or logical relation to the action." (See
24 Undisputed Facts 4 and 5.) Armstrong attempts to raise a triable
25 issue of fact by showing that the Miscavige declaration was
26 submitted in connection with a discovery related matter while the
27 Young declaration was submitted in connection with a summary
28 judgment motion. This evidence is not sufficient to raise a

1 triable issue. First, Armstrong cites no evidence showing the
2 context in which Young's declaration was submitted. Second, and
3 more importantly, "proceeding" is not limited to the particular
4 issue before the court at that moment. (See Radar v. Thrasher
5 (1972) 22 Cal.App.3d 883, 889.) The statements by Miscavige go
6 to Armstrong's motives and credibility in testifying as to the
7 matters set forth in the narrative statement. (See Undisputed
8 Fact 5.) Thus, there is "some connection" to the Fishman action,
9 and by its action in submitting the declaration, Church is
10 clearly trying to achieve an object of the litigation by having
11 the trier of fact not believe Armstrong.

12 3. Armstrong's claim based on misuse of financial records
13 obtained through discovery fails. Church's evidence shows that
14 it used the financial records only to prepare for trial in this
15 action. (Fact 17, citing Exhibits 3 and 4.) Armstrong's efforts
16 to raise a triable issue fail. First, his attempt to show a
17 violation of a protective order is not sufficient in that it does
18 not show any efforts by Church to "accomplish[] . . . an improper
19 purpose" or to "obtain an unjustifiable collateral advantage"
20 (i.e., no "use" of the discovery documents). (Younger v. Solomon
21 (1974) 38 Cal.App.3d 289, 297.) Second, his evidence regarding
22 the document titled "Who is Gerald Armstrong?" is not sufficient
23 in that it does not show that any statement in that document was
24 based on his personal financial information. In fact, every
25 statement in the document was contained in Church's original
26 complaint. (Compare Exhibit 1(N), p. 4 with Complaint, ¶¶ 2 and
27 39.)

28 4. Armstrong's motion for summary judgment or,

1 alternatively, summary adjudication on Church's complaint is
 2 DENIED. First, Church brings this action under Civil Code
 3 Section 3439.04, not 3439.05 (See Complaint ¶¶ 29-31, 36-38);
 4 thus, proof of insolvency is not required. Second, the truth or
 5 falsity of Armstrong's religious beliefs are not relevant in
 6 determining, for example, whether Armstrong received "reasonably
 7 equivalent" consideration and whether he knew or should have
 8 known he would incur a debt to Church beyond his ability to pay.
 9 (§ 3439.04, Subd. (b).) Third, this action does not require the
 10 court to establish any religion. The religious beliefs of the
 11 parties are irrelevant in determining the issues in this action.

12 5. Armstrong filed many of his opposition papers three
 13 days late (due 8/26, filed 8/29). The court has considered the
 14 late filed papers. However, Armstrong shall pay sanctions in the
 15 amount of \$49, payable to the clerk of the court within 10 days.

16 Dated: ^{Oct} September 20, 1994

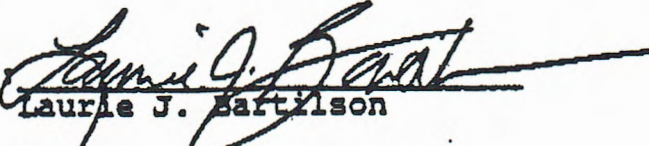
18 GARY W. THOMAS
 19

GARY W. THOMAS
 20 Judge of the Superior Court

21 Submitted by:

22 Andrew H. Wilson
 23 WILSON, RYAN & CAMPILONGO

24 BOWLES & MOXON

25 By 
 26 Laurie J. Bartilson

27 Attorneys for Plaintiff
 28 CHURCH OF SCIENTOLOGY
 INTERNATIONAL

1 APPROVED AS TO FORM:

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



By: _____
Ford Greene, Esq.
HUB LAW OFFICES
Attorney for Defendants
GERALD ARMSTRONG and THE GERALD
ARMSTRONG CORPORATION

By: _____
Michael Walton, Esq.
Pro Se

WHAT IS SCIENTOLOGY?

*The Comprehensive Reference
on the World's Fastest Growing Religion*

— *Bridge* —

PUBLICATIONS, INC.

Compiled by staff of the Church of Scientology International

Published by **Bridge Publications, Inc.** 4751 Fountain Avenue, Los Angeles, California 90029

ISBN 0-88404-633-8

Published in other countries by **NEW ERA Publications International ApS** Store Kongensgade 55, 1264 Copenhagen K, Denmark

ISBN 87-7336-909-8

©1992 Church of Scientology International. All Rights Reserved.

Grateful acknowledgment is made to L. Ron Hubbard Library for permission to reproduce selections from the copyrighted works of L. Ron Hubbard.

No part of this book may be reproduced without the permission of the copyright owner.

Based on the religious literature and works of L. Ron Hubbard, who developed *Scientology*® applied religious philosophy and *Dianetics*® spiritual healing technology; this book is presented to the reader as part of his personal research into life, and the application of same by others, and should be construed only as a written report of such research and not as a statement of claims made by the Church or the Founder. The attainment of the benefits and goals of Scientology philosophy requires each individual's dedicated participation, as only through his own efforts can he achieve these.

The *Hubbard*® Electrometer is a religious artifact used in the Church confessional. It in itself does nothing, and is used by ministers only; to assist parishioners in locating areas of spiritual distress or travail.

The *Purification* program cannot be construed as a recommendation of medical treatment or medication and it is not professed as a physical handling for bodies nor is any claim made to that effect.

Scientology, *Dianetics*, *ARC Straightwire*, *Audited NOTs*, *Celebrity Centre*, *E-Meter*, *False Purpose Rundown*, *FEBC*, *Flag*, *Flag OT Executive Rundown*, *Freewinds*, *Golden Era Productions*, *Happiness Rundown*, *HCO*, *HQS*, *HRD*, *Hubbard*, *Hubbard Life Orientation*, *INCOMM*, *L10*, *L11*, *L12*, the *LRH* Device, the *L. Ron Hubbard* Signature, *Mark Super VII*, *Mark VI*, *Mark V*, *Method One*, *NED*, *New Era Dianetics*, *New Life Rundown*, *New Vitality Rundown*, *NOTs*, *OEG*, *OT*, *Purification*, *Purification Rundown*, *Religious Technology Center*, *Saint Hill*, *Scientometric*, *SHSBC*, *Solo NOTs*, *Source Student Hat*, *Sunshine Rundown*, *The Bridge*, *Truth Revealed*, *Advance!*, *Cause*, *Celebrity*, *The Auditor*, the *CSI* Symbol, the *Dianetics* Symbol in a Circle, the *Class VIII* Symbol, the *Division 6* Symbol, the *Fast Flow Student* Symbol, the *Flag Ship Service Org* Symbol, the *FSO* Symbol, the *Key to Life* Symbol, the *Life Orientation* Symbol, the *Mark Super VII* Symbol, the *OT* Symbol, the *OT* Symbol in Wreath, the *Pro TRs* Symbol, the *Scientology* Symbol, the *Sea Org* Symbol, the *SHSBC* Symbol, the *Scientology Missions International* Symbol, the *Solo Auditor* Symbol, the *AOSH ANZO* Logo, the *Class V Organization* Logo, the *Freewinds* Logo, the *New World Corps* Logo, the *I HELP* Logo, the *Class IV Auditor* Badge, the *Class V Auditor* Badge, the *Class V Graduate* Badge, the *Class VIII Auditor* Badge, the *HCO* Badge, the *Scientology* Cross, the *Power Pin* Symbol and the *Release Pin* Symbol are trademarks and service marks owned by Religious Technology Center and are used with its permission. *Scientologist* is a collective membership mark designating members of the affiliated churches and missions of Scientology.

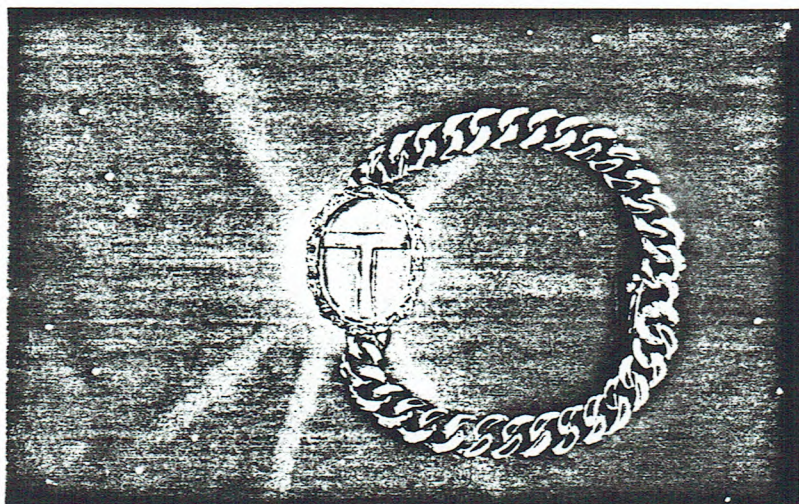
Applied Scholastics, *Narconon*, the *Applied Scholastics* Logo and the *Narconon* Logo are trademarks owned by *ABLE International* and are used with its permission.

WISE and the *WISE* Logo are trademarks owned by *WISE International* and are used with its permission.

NEW ERA is a trademark and service mark.

Photography by *Golden Era Productions* except as listed (company and page number): *Culver Pictures*—65; ©1992 *Syigma*, Photographer: *Baggioni*—77; *The Bettman Archive*—41, 75; ©1992 *FPG International*, Photographers: *Peter Gridley*—477, 479, *Arthur Tilley*—483, *Michael Krasowitz*—465, *Dick Luria*—469.

Printed in the United States of America



To acknowledge one's attainment of New OT VIII, a Scientologist may wear the OT bracelet.

THE STATE OF OPERATING THETAN

For thousands of years men have sought the state of complete spiritual freedom from the endless cycle of birth and death, a state of full awareness, memory and ability as a spirit independent of the flesh.

By eradicating the reactive mind in clearing we not only achieve an erasure of the seeming evil in man, we also overcome the barriers which made it so difficult to attain total spiritual independence and serenity. Thus, once a person achieves Clear he is now able to become refamiliarized with his native capabilities. As man is basically good, a being who is Clear becomes willing to trust himself with greater and greater abilities.

In Scientology, a state of complete spiritual freedom is attainable. It has been achieved not on a temporary basis but on a stable plane of full awareness and ability, unqualified by accident or deterioration. And it is not limited to a few.

It is called, in Scientology, "Operating Thetan." The definition of the state of Operating Thetan is "knowing and willing cause over life, thought, matter, energy, space and time."

The amount of spiritual gain available to a person is something rarely conceived. In

an aberrated state where one's energy is primarily absorbed attempting to straighten out personal problems, a person is unlikely to lift his gaze to the glories that could be his as a fully rehabilitated and able being, not just as *Homo sapiens*.

On the auditing services above the state of Clear, called the "OT levels," one is no longer dealing with a person in relationship to his job, his house payments or his aches and pains. These will have been addressed at lower levels since it is necessary to free a person's attention from these matters in order to address higher aspects of existence. Having been freed of his own reactive mind, the person is able to undertake further steps in auditing by himself, becoming at the same time the auditor and the person being audited. This is "Solo auditing," learned on the Solo Auditor's Course. The Solo auditor uses communication drills, adapted to this level of skill, an E-Meter and exact processes, enabling him to rise into the realm of OT.

At the level of Operating Thetan one deals with the individual's own *immortality* as a spiritual being. One deals with the thetan himself in relationship to eternity; not to the eternity that lies *behind* him, but to the eternity which lies *ahead*.

On the OT levels one is rising to *eternity*. The vastness of time which has existed in the past is matched by at least as much time which lies ahead. *That* is eternity and a being will be in that eternity, and he will be in a good state or a bad state. One can step out of a job or a relationship or a worn-out suit of clothes, but one is not going to step out of life.

Contrary to those who teach that man cannot improve and that some seventy years in a body are all one can expect, there are states higher than that of mortal man. The state of OT does exist and people do attain it. Like any other gain in Scientology it is attained gradually. Just as it would not be as beneficial to give someone New Era Dianetics auditing before improving his

abilities with the Scientology Expanded Grades, so it is fruitless to try and move someone onto the OT levels before he is ready for them. One might as well pull a baby out of its bassinet and demand that he run. He won't make it until he has first learned to crawl and then walk. The reactive mind thoroughly blocks the thetan from regaining and exercising his native powers. But once this block is removed, the person can learn to operate as himself, a spiritual being.

The OT levels contain the very advanced materials of L. Ron Hubbard's researches and it is here the person achieves the ultimate realization of his own nature and his relationship to life and all the dynamics. Abilities return as he advances up through the OT levels and he recovers the entirety of his beingness.

Some of the miracles of life have been exposed to full view for the first time ever on the OT levels. Not the least of these miracles

is knowing immortality and freedom from the cycle of birth and death.

The way is true and plainly marked. All one needs to do is to place his feet upon the first rung of the ladder and ascend to Clear and then walk upward to the level of Operating Thetan.

Auditing enables the individual to span the distance from *Homo sapiens*, with his drugs, his pains, his problems, upsets and fears, to higher states and freedom as a spiritual being. Such states are obtainable only through auditing. But they do exist and they are attainable and they fully restore a being to his native potential.

Throughout history man has had many solutions to the problems of existence and has sought far and wide for the answers to himself. Auditing *is* the solution and does provide the answers. Even a small amount of auditing can make this truth abundantly plain.

IT IS HEREBY FURTHER ORDERED that any attempt by BIL to assert a defense based on the advice of counsel is not timely and is deemed waived.

IT IS HEREBY FURTHER ORDERED that the earlier "legal" rulings of the court will not be reconsidered. "Factual" rulings, however, have been reconsidered.

IT IS HEREBY FURTHER ORDERED that the court finds BIL in contempt. BIL violated the injunction by assisting in the transfer of funds out of the Heatherdale, even though the funds did not leave BIL. BIL violated the injunction by assisting in the transfer of \$117,000 out of BIL prior to the Luxembourg order. Finally, BIL violated the injunction by assisting McLaughlin in obtaining the Luxembourg order.

IT IS HEREBY FURTHER ORDERED that a motion on the proper sanctions as a result of the contempt will be heard on June 14, 1993 at 10:30 a.m.

IT IS SO ORDERED.



BRIDGE PUBLICATIONS, INC., a California corporation; Religious Technology Center, a California corporation; and Church of Scientology International, a California corporation, Plaintiffs,

v.

Enid VIEN, an individual; and Does 1 through 20, inclusive, Defendants.

No. CV 92-1539 H(M).

United States District Court,
S.D. California.

May 4, 1993.

Religious organizations brought action against instructor for federal and state copyright infringement and misappropriation of trade secrets. The District Court, Huff, J.,

held that: (1) instructor violated federal copyright laws by copying or directing her students to copy organizations' literary works and sound recordings for use in course instructor offered for sale; (2) instructor violated state copyright law with respect to recordings fixed prior to 1972; (3) information contained in organizations' materials was "trade secret" which instructor misappropriated; (4) statutes of limitations did not bar claims; (5) First Amendment did not bar claims; and (6) instructor's use was not "fair use."

Ordered accordingly.

1. Federal Civil Procedure Ⓒ2470.1

Any doubt as to existence of any issue of material fact requires denial of motion for summary judgment.

2. Federal Civil Procedure Ⓒ2541

On motion for summary judgment, opposing party does not create genuine issue of material fact by submitting her own affidavit which contradicts her prior deposition testimony.

3. Copyrights and Intellectual Property Ⓒ51

Two elements to be proven in copyright infringement action are ownership of valid copyright and copying of copyrighted work.

4. Copyrights and Intellectual Property Ⓒ55, 66

Instructor who offered course for sale violated federal copyright laws by copying or directing her students to copy, as part of course, literary works and sound recordings, published and unpublished, to which religious organizations owned copyrights.

5. Copyrights and Intellectual Property Ⓒ89(2)

Alleged infringer's declaration in opposition to copyright holders' motion for summary judgment that she never copied or directed copying of copyrighted sound recordings did not create genuine issue of material fact; declaration was contradicted by alleged infringer's prior declaration and deposition testimony.

6. Copyrights and Intellectual Property

⊖66

Instructor who offered religious course for sale violated California copyright law by copying or directing her students to copy, as part of course, sound recordings to which religious organizations owned copyrights and which were fixed on tape prior to effective date of federal protection for such recordings. West's Ann.Cal.Civ.Code § 980(a)(2).

7. Torts ⊖10(5)

Under common law, trade secret is determined by extent to which secrecy of information is guarded and according to value of information to possessor and its competitors.

8. Torts ⊖10(5)

Under California law, information contained in religious organizations' materials was "trade secret," so that instructor's use of information in courses which she offered for sale was misappropriation of trade secret; information was confidential and kept under tight security, was disclosed only to those who had acquired requisite level of spiritual training, and could not be accessed without first signing agreement to maintain its secrecy and confidentiality, instructor knew of confidential nature of information and signed confidentiality agreement, and religious organizations used proceeds from sale of materials to support churches world-wide. West's Ann.Cal.Civ.Code §§ 3426.1, 3426.1(b).

See publication Words and Phrases for other judicial constructions and definitions.

9. Judgment ⊖570(5), 724

Dismissal of religious organizations' misappropriation of trade secrets claims, in prior action, with respect to specific portion of information contained in their material did not bar their trade secret claim against instructor who used information in course which she offered for sale; substantive merits of prior trade secret claim were not necessarily and finally adjudicated as prior claim was dismissed as discovery sanction, and instructor was not party to prior action.

10. Limitation of Actions ⊖95(8)

Religious organizations' federal and state copyright infringement claims and their

state misappropriation of trade secret claims, with respect to instructor's copying and use of their literary works and sound recordings in course which she offered for sale, were not barred by applicable three-year statutes of limitations, even though organizations' officers knew that instructor left organization to start her own ministry, asked about instructor's knowledge of organizations' materials more than three years before commencement of action, and were told that she had those materials in her possession; organizations permitted instructor to learn and study materials under confidentiality agreement, and there was no evidence that organizations knew of potential use instructor had for materials in her ministry. 17 U.S.C.A. § 507; West's Ann.Cal.Civ.Code §§ 980(a)(2), 3426.3; West's Ann.Cal.C.C.P. § 338(1) (1987).

11. Limitation of Actions ⊖58(1), 95(8)

Even if religious organizations had knowledge of instructor's unauthorized copying of their literary works and sound recordings, for use in course offered for sale, more than three years prior to commencement of their state and federal copyright infringement claims, those claims were not barred by three-year statute of limitations; there was substantial, uncontroverted evidence that instructor violated copyright through unauthorized copying within three years of instant action. West's Ann.Cal.Civ.Code § 338(1) (1987); 17 U.S.C.A. § 507.

12. Constitutional Law ⊖84.5(1)

Copyrights and Intellectual Property

⊖2, 4

Religious organizations' federal and state claims for copyright infringement and misappropriation of trade secrets against instructor who copied and used their literary works and sound recordings in course which she offered for sale were not barred by religious nature of works, notwithstanding instructor's claims that enforcing copyrights and trade secrets rights to materials allegedly needed to practice her religion restricted her free exercise of religion and unconstitutionally preferred organizations' religion over her religion; neutral application of copyright

and trade secret
tution. U.S.C.A.

13. Copyrights and Intellectual Property

⊖53.2

In determining
copyright law, it is
statutory factors f

14. Copyrights and Intellectual Property

⊖56, 66

Instructor's c
zations' literary w
in course which sh
"fair use" of those
copyrighted works
from which she
year for ten year
purpose as organ
ied each work at i
use works solely f
copying was exte
consisted of copyi
after time, and w
thor's creative tho
ly informational.

See publicat
for other judici
initions.

15. Copyrights and Intellectual Property

⊖53.2

In context of
cial use of copyri
tively unfair, v
weighs in favor
§ 107.

16. Copyrights and Intellectual Property

⊖53.2

When nature
creative, as oppo
those works is le
use. 17 U.S.C.A.

Toby L. Plevin
dants.

Neil F. Martin
McClain, San Di
Small, Larkin, K
CA, Helena K.
Hollywood, CA,

and trade secret law does not offend constitution. U.S.C.A. Const.Amend. 1.

13. Copyrights and Intellectual Property ⚡53.2

In determining fair use under federal copyright law, it is necessary to balance four statutory factors flexibly. 17 U.S.C.A. § 107.

14. Copyrights and Intellectual Property ⚡56, 66

Instructor's copying of religious organizations' literary works and sound recordings in course which she offered for sale was not "fair use" of those materials; instructor used copyrighted works as integral part of course from which she earned up to \$12,000 per year for ten years, used works for same purpose as organizations, substantially copied each work at issue, and did not copy and use works solely for her own use in teaching, copying was extensive and methodical and consisted of copying from same author, time after time, and works were product of author's creative thought process and not merely informational. 17 U.S.C.A. § 107.

See publication Words and Phrases for other judicial constructions and definitions.

15. Copyrights and Intellectual Property ⚡53.2

In context of fair use analysis, commercial use of copyrighted material is presumptively unfair, while noncommercial use weighs in favor of defendant. 17 U.S.C.A. § 107.

16. Copyrights and Intellectual Property ⚡53.2

When nature of copyrighted works is creative, as opposed to informational, use of those works is less likely to be deemed fair use. 17 U.S.C.A. § 107.

Toby L. Plevin, Westwood, CA, for defendants.

Neil F. Martin, Brown, Martin, Haller and McClain, San Diego, CA, Thomas M. Small, Small, Larkin, Kidde & Golant, Los Angeles, CA, Helena K. Kobrin, Bowles & Moxon, Hollywood, CA, for plaintiffs.

ORDER GRANTING SUMMARY JUDGMENT

HUFF, District Judge.

The above-captioned matter came on regularly for hearing before the Honorable Judge Marilyn L. Huff on April 26, 1993. Thomas M. Small appeared for plaintiffs and Toby L. Plevin appeared for defendant. Considering all of the papers, pleadings, motions and declarations before the court, and after hearing the matter, the court finds that no material issue of fact exists and plaintiffs are entitled to judgment as a matter of law on the copyright and trade secret claims.

1. Standard for summary judgment

[1, 2] A motion for summary judgment shall be granted where "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir.), cert. denied, 440 U.S. 981, 99 S.Ct. 1790, 60 L.Ed.2d 241 (1979). Any doubt as to the existence of any issue of material fact requires denial of the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986). The opposing party "cannot rest on the mere allegations or denials of his pleading, but [the] response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing that there is a genuine issue for trial," and "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Anderson*, 477 U.S. at 257, 106 S.Ct. at 2514. However, the opposing party does not create a genuine issue of material fact by submitting her own affidavit which contradicts her prior deposition testimony. *Harkins Amusement Enterprises, Inc. v. General Cinema Corp.*, 850 F.2d 477, 482 (9th Cir.), cert. denied, 488 U.S. 1019, 109 S.Ct. 817, 102 L.Ed.2d 806 (1989) (citing *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540, 543-44 (9th Cir.1975), for the proposition that a party's inconsistent affidavit given after deposition testimony, in opposition to a summary judgment motion, does not create a genuine issue of fact).

2. Application of standard

a. Copyright claims

[3, 4] There are two elements to be proven in a copyright infringement action: (1) ownership of a valid copyright, and (2) copying of the copyrighted work. *Data East USA, Inc. v. Epyx, Inc.*, 862 F.2d 204, 206 (9th Cir.1988); *Baxter v. MCA, Inc.*, 812 F.2d 421, 423 (9th Cir.), cert. denied, 484 U.S. 954, 108 S.Ct. 346, 98 L.Ed.2d 372 (1987). As this court has held in its rulings on the temporary restraining order and the preliminary injunction issued in this case, there is no issue of fact regarding plaintiffs' ownership of the copyrights on the literary works and sound recordings, published and unpublished. See also Declaration of Marilyn Pisani ("Pisani Decl."), ¶¶ 2, 5, 7, Exhibits C, I, L, O, R, U, X and AA; Declaration of Allan Cartwright ("Cartwright Decl."), ¶¶ 2-3, 5, 7, Exhibit B, E, and LLL; Declaration of Warren McShane ("McShane Decl."), ¶¶ 2, 5, 7, 9, Exhibits D and E.

Nor is there a genuine issue of fact regarding defendant's copying of, or directing the copying of, the copyrighted works. The undisputed evidence shows that defendant copied or directed her students to copy plaintiffs' copyrighted materials as part of a "Dynamism" course which she offered for sale. See Declaration of Gerri Salinas ("Salinas Decl."), ¶¶ 4-5, 8-11; Pisani Decl., ¶¶ 5, 7; Cartwright Decl., ¶¶ 5, 7; McShane Decl., ¶¶ 7, 9-10. Specifically, defendant would either copy the materials herself, or would give them to her students to copy. See Salinas Decl., ¶ 8; Deposition of Enid Vien ("Vien Depo."), Vol. I, p. 44, lines 3-20, p. 45, lines 15-21; p. 80, lines 8-19; Vol. II, P. 23, lines 2-12; p. 96, lines 1-12; p. 143, line 18—p. 144, line 8; Deposition of Mary Volk ("Volk Depo."), p. 25, line 17—p. 26, line 11. Additionally, defendant admitted in her November 4, 1992 Declaration that she must use bootleg or copied materials as part of the courses she offers her students.

[5] Defendant's declaration in opposition to this motion contends that she never copied, or directed the copying of, the sound recordings. However, this is contradicted by her prior declaration and deposition testimony

and, therefore, does not create a genuine issue of material fact. *Harkins Amusement Enterprises, Inc. v. General Cinema Corp.*, 850 F.2d 477, 482 (9th Cir.1988).

b. Sound recordings made prior to February 15, 1972

[6] There is also no factual dispute that defendant copied, or directed the copying of, L. Ron Hubbard's tape recorded lectures which were fixed on tape prior to February 15, 1972 and, therefore, are protected under California Civil Code section 980(a)(2). See *Goldstein v. California*, 412 U.S. 546, 552, 93 S.Ct. 2303, 2307, 37 L.Ed.2d 163 (1973) (recordings fixed and sold prior to February 15, 1972 are not protected under federal copyright law, but may be given state protection); *Lone Ranger Television v. Program Radio Corp.*, 740 F.2d 718, 724 (9th Cir.1984). The uncontroverted evidence shows that defendant violated section 980(a)(2) by making copies of the recordings, or by having such copies made, without authorization. See Salinas Decl., ¶ 8(b); Cartwright Decl., ¶ 7. Again, defendant's declaration in opposition to the instant motion does not create a factual dispute in light of her earlier declaration and deposition testimony, which admit to copying and using "bootleg" L. Ron Hubbard tapes as part of her Dynamism courses. See *Harkins Amusement Enterprises, supra*, 850 F.2d at 482.

c. Trade secret claim

[7] Finally, no genuine issue of fact exists as to whether defendant misappropriated plaintiffs' trade secrets in the works known generally as the "Advanced Technology." California Civil Code section 3426.1 defines a "trade secret" as information which has independent economic value from not being generally known, the secrecy of which has been reasonably protected, or reasonably attempted to be protected. A trade secret is misappropriated when, among other things, it is disclosed or used by another without consent, and at the time of disclosure or use that person knew the secret was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use. Cal.Civ.Code § 3426.1(b). Similarly, under the common

law, a trade secret is information of such value that its disclosure would result in injury to the holder. See Cal.Civ.Code § 3426, comment c. *Salinas v. Aqueduct*, 676 F.2d 1000, 1003 (9th Cir.1982), app. 3d 216.

[8] The court's ruling in this case is in accordance with the law, plaintiffs' claims as a trade secret dispute exist, and the court's ruling is in accordance with the law. Depo., Vol. I, p. 18; Salinas Decl., ¶ 10, Exhibit C.

L.

There is no genuine issue of fact regarding plaintiffs' ownership of the materials. The court's ruling in this case is in accordance with the law. Depo., Vol. I, p. 18; Salinas Decl., ¶ 10, Exhibit C.

Defendant's declaration in opposition to this motion contends that she never copied, or directed the copying of, the sound recordings. However, this is contradicted by her prior declaration and deposition testimony. Depo., Vol. I, p. 18; Salinas Decl., ¶ 10, Exhibit C.

law, a trade secret is determined by the extent to which the secrecy of the information is guarded, and according to the value of the information to the possessor and its competitors. See Restatement (First) of Torts, § 757, comment 6; *Chicago Lock Co. v. Fanberg*, 676 F.2d 400, 404 (9th Cir.1982); *Sinclair v. Aquarius Electronics, Inc.*, 42 Cal. App.3d 216, 221, 116 Cal.Rptr. 654 (1974).

[8] The court finds that as a matter of law, plaintiffs' "Advanced Technology" qualifies as a trade secret, and that no factual dispute exists regarding defendant's misappropriation of these works through the courses offered to her students. See Vien Depo., Vol. I, p. 97, lines 5-10; p. 98, lines 8-18; Salinas Decl., ¶ 8; McShane Decl., ¶¶ 7, 10, Exhibit C.

1. Secrecy of materials

There is no factual dispute about whether plaintiffs have used reasonable steps to keep the materials secret. The Advanced Technology is confidential and kept under tight security, is disclosed only to those who have attained the requisite level of spiritual training, and cannot be accessed without first signing an agreement to maintain its secrecy and confidentiality. See McShane Decl., ¶¶ 3-4. Indeed, plaintiff knew of the confidential nature of the materials and signed a confidentiality agreement prior to their disclosure to her. See Vien Depo., Vol. I, p. 59 line 18—p. 60, line 12; Vien Depo. Vol. II, p. 25, line 5—p. 27, line 10, Exhibits 7 and 8 thereto; p. 31, line 4—p. 32, line 15.

Defendant attempts to create a factual issue about the secrecy of a portion of the Advanced Technology called "Power Processes," or "5 and 5a Processing," by declaring in opposition that she "studied [that portion] at a time when they were not deemed to be secret." However, this declaration is directly contradicted by defendant's earlier deposition testimony and the confidentiality agreement and, therefore, does not create a genuine issue of material fact. See McShane Decl., ¶ 12, Exhibits A, B, and C, attached to Reply; Declaration of Howard Gutfeld, ¶¶ 3-5, attached to Reply; Vien Depo., p. 11, line 6—p. 12, line 16, p. 15, line 17, p. 16, lines 1-16, p. 27, lines 13-14, attached to Reply.

Defendant also argues that other "issues of fact" remain as to the trade secret claim. These arguments are without merit. Defendant first claims that a certain portion of the Advanced Technology, known as "OT 3," has been repeatedly reported in print and broadcast media, thereby stripping its trade secret status. However, plaintiffs claim these publications are distortions of the secret materials and, therefore, plaintiffs make no claim of trade secret status or confidentiality as to any of these stories. Moreover, plaintiffs concede that any information in these stories should be excepted from any injunction this court might order. See McShane Decl., ¶¶ 7-11, attached to Reply.

[9] Defendant next argues that plaintiffs cannot gain trade secret status for a portion of the Advanced Technology known as "NOTS," because a previous court, in a previous case with different defendants, dismissed trade secret claims on that material as a discovery sanction. Defendant offers no authority for this contention. Indeed, as the substantive merits of the earlier trade secret claim were not necessarily and finally adjudicated upon, and defendant was not a party to that suit, it appears that case has no res judicata or collateral estoppel effect here. See generally *Federated Dept. Stores v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981); *Guild Wineries and Distilleries v. Whitehall Co., Ltd.*, 853 F.2d 755 (9th Cir.1988).

2. Independent economic value

Finally, there is no factual dispute as to the independent economic value of the Advanced Technology. It clearly has value to plaintiffs, who use proceeds from the sale of these materials, as well as other materials, to support the operations of Scientology Churches world-wide. See McShane Decl., ¶ 12. Indeed, the Supreme Court has recognized the economic need for churches to receive such proceeds, noting that "[i]t is plain that a religious organization needs funds to remain a going concern." *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 111, 63 S.Ct. 870, 874, 87 L.Ed. 1292 (1943). These materials also have value to defendant,

a competitor of plaintiffs', who uses the Advanced Technology in the delivery of the courses for which she is paid. For example, defendant admitted that she would charge \$3000 for a course package which includes the Advanced Technology materials known as "SOLO," "OT 1," "OT 2," and "OT 3." See Vien Depo., Vol. I, p. 97, lines 5-10; p. 98, lines 8-18.

Therefore, as no genuine issue of fact exists, the court finds as a matter of California statutory and common law that defendant has misappropriated plaintiffs' trade secrets.

3. Defenses common to all claims

a. Statute of limitations.

[10] Defendant argues, for the first time, that all claims in this action are barred by the statute of limitations.¹ In support of this argument defendant offers evidence that, in 1984, plaintiffs' officers had asked about defendant's knowledge of the Advanced Technology materials and were told she had those materials in her possession. See Declarations of Enid Vien and Lauren Allen attached to Opposition to Summary Judgment. However, these declarations reveal plaintiffs' representatives were also assured that defendant had not distributed or disclosed these materials. As defendant has the burden of proof on this affirmative defense, she must come forward with evidence that plaintiffs were on notice of all the elements of a trade secret violation. To the contrary, her evidence actually supports plaintiffs' position that they did not have such knowledge.

Defendant argues plaintiffs must have known about defendant's infringing activities because they knew she left the Church of Scientology to start her own ministry. This argument is without merit. Plaintiffs had always permitted Ms. Vien to learn and study the Advanced Technology pursuant to the above-referenced confidentiality agreement. The fact she may have had actual

copies of the Advanced Technology, as opposed to her own notes and mental impressions, does not create an issue regarding plaintiffs' knowledge of all the elements of trade secret misappropriation. The argument that plaintiffs should have known that defendant would have disclosed the Advanced Technology to her students is also without merit. There is no evidence that plaintiffs knew of the potential use, if any, Ms. Vien might have for the Advanced Technology in her ministry.

The court finds these declarations fail to establish, or even raise a factual issue, that plaintiffs had knowledge, dating back to 1984, of any of the violations alleged in the complaint. The statute of limitations defense is, therefore, without merit. See *Intermedics, Inc. v. Ventritec, Inc.*, 775 F.Supp. 1258, 1265-66 (N.D.Cal.1991) (plaintiff's prior suit against defendant for "having knowledge of" plaintiff's trade secrets was not sufficient "discovery of the misappropriation" to start limitations period).

[11] Indeed, on the federal and state copyright claims, even if defendant's declarations establish plaintiffs' knowledge of defendant's unauthorized copying in 1984, there is substantial, uncontroverted evidence that defendant has violated these copyrights within three years of the instant suit.² Accordingly, these claims were timely filed. See *Hoey v. Dixel Systems Corp.*, 716 F.Supp. 222 (E.D.Va.1989) (where there is a continuing violation of the copyright, the action is timely as to infringing acts accruing within the 3-year limitations period); cf. *Mangini v. Aerojet-General Corp.*, 230 Cal.App.3d 1125, 281 Cal.Rptr. 827 (1991) (every continuation of a nuisance gives rise to a separate claim for damages under the 3-year limitations period in Civ.Proc.Code § 338(1)).

b. First amendment.

[12] As this court stated in its Order Granting Preliminary Injunction, plaintiffs'

1. The relevant statute of limitations are: 17 U.S.C. § 507 (3 years for federal copyright claims); Cal.Civ.Proc.Code § 338(1) (3 years for state copyright claims based on Cal.Civ.Code § 980(a)(2)); Cal.Civ.Code § 3426.3 (3 years for trade secret misappropriation).

2. It should be noted, however, that defendant's declarations merely point to plaintiffs' alleged knowledge of Ms. Vien's possession of portions of the Advanced Technology materials. There is no evidentiary basis to find that, dating back to 1984, plaintiffs' knew of defendant's unauthorized copying of any of the materials at issue.

claims for cop
tion are not b
the works.
enforcing pla
violated neith
the free exer
tian Scientis
Directors, Fi
829 F.2d 115
ly, a grant of
poses no con
works are eli
eral copyrigh
Center, Chur
Scott, 869 F.
(religious ma
secret under
owner an ac
competitors);
v. Wollershei
Cir.), cert. d
1336, 94 L.E
v. Wolf, 443
3026, 61 L.F
Benedict of
U.S. 640, 64
1512 (1914).

Defendant
refuse to se
needs to pra
copyrights a
her free exe
tionally pref
over defenda
ferred no auth
Rather, the c
osition that
and trade se
not offend t

4. Specific

a. Fair u

[13, 14] I
time, the ap
trine" to the
the Copyrig
the fair us
purposes s
reporting,
copies for
research,
right. In

claims for copyright and trade secret protection are not barred by the religious nature of the works. The court expressly held that enforcing plaintiffs' rights in these works violated neither the establishment clause nor the free exercise clause. See *United Christian Scientists v. Christian Science Bd. of Directors, First Church of Christ Scientist*, 829 F.2d 1152, 1159 (D.C.Cir.1987) ("normally, a grant of copyright on a religious work poses no constitutional difficulty. Religious works are eligible for protection under general copyright laws"); *Religious Technology Center, Church of Scientology Int'l, Inc. v. Scott*, 869 F.2d 1306, 1309-10 (9th Cir.1989) (religious material can qualify as a trade secret under California law if it confers on its owner an actual economic advantage over competitors); *Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1090-91 (9th Cir.), cert. denied, 479 U.S. 1103, 107 S.Ct. 1336, 94 L.Ed.2d 187 (1987); see also *Jones v. Wolf*, 443 U.S. 595, 604, 99 S.Ct. 3020, 3026, 61 L.Ed.2d 775 (1979); *Order of St. Benedict of New Jersey v. Steinhauser*, 234 U.S. 640, 644, 34 S.Ct. 932, 933, 58 L.Ed. 1512 (1914).

Defendant argues that because plaintiffs refuse to sell defendant the materials she needs to practice her religion, enforcing the copyrights and trade secret rights restricts her free exercise of religion, and unconstitutionally prefers the religion of Scientology over defendant's religion. Defendant has offered no authority supporting this contention. Rather, the case law cited supports the proposition that neutral application of copyright and trade secret law to religious works does not offend the constitution.

4. Specific defenses

a. Fair use of the copyrighted works.

[13,14] Defendant raises, for the first time, the applicability of the "fair use doctrine" to the works at issue. Section 107 of the Copyright Act provides that

the fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use

made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

In determining "fair use" under the statute, it is necessary to balance the four factors flexibly. *Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir.1986). Balancing these factors here results in a finding that defendant's use is not protected by the statute.

[15] The first factor weighs against a finding of fair use. The uncontroverted evidence shows that defendant uses the copyrighted works as an integral part of the Dynamism courses she sells to her students. See Salinas Decl., ¶¶ 4-5, 6, 8-11, Exhibit B; Pisani Decl., ¶¶ 5, 7; Cartwright Decl., ¶¶ 5, 7; McShane Decl., ¶¶ 7, 9-10; Vien Depo., Vol. II, p. 23, lines 2-12; p. 96, lines 1-12; p. 143, line 18—p. 144, line 8. Indeed, defendant admits to having earned up to \$12,000 a year for the ten years she has been offering these courses. See Vien Decl., ¶ 6, attached to Opposition. In general, commercial use of copyrighted material is presumptively unfair (*Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 449-51, 104 S.Ct. 774, 792-93, 78 L.Ed.2d 574 (1984)), whereas noncommercial use weighs in favor of the defendant. See, e.g., *Marcus v. Rowley*, 695 F.2d 1171, 1175 (9th Cir.1983). Defendant's fair use claim is further weakened under the first factor because she uses the copyrighted works for the same intrinsic purpose as plaintiffs. See *Marcus*, 695 F.2d at 1175; *Weissmann v. Freeman*, 868 F.2d 1313, 1324 (2nd Cir.), cert. denied, 493 U.S. 883, 110 S.Ct. 219, 107 L.Ed.2d 172 (1989).

[16] The second factor also weighs against a finding of fair use. When the nature of the copyrighted works is creative, as opposed to informational, use of those works is less likely to be deemed fair. See

Abend v. MCA, Inc., 863 F.2d 1465, 1481 (9th Cir.), *aff'd* 495 U.S. 207, 110 S.Ct. 1750, 109 L.Ed.2d 184 (1990). The undisputed evidence shows that L. Ron Hubbard's works are the product of his creative thought process, and not merely informational.

The third factor also weighs against defendant. The undisputed facts show that defendant has substantially copied each work at issue, and in some cases the whole work. See Pisani Decl., ¶ 7; Cartwright Decl., ¶ 7; McShane Decl., ¶ 9. This weighs heavily against a finding of fair use, especially considering the commercial nature of the use. See, e.g., *Marcus*, 695 F.2d at 1176 ("wholesale copying of copyrighted material precludes application of the fair use doctrine"); *Abend*, 863 F.2d at 1481 (wholesale copying for a purely commercial purpose may never be a fair use).

The fourth factor concerns "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107. As this court discussed previously in the trade secret context, since defendant uses the works for the same purpose intended by plaintiffs, it appears defendant's unauthorized copies fulfill "the demand for the original" works and "diminish or prejudice" their potential sale. See *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155-56 (9th Cir.1986). This factor goes against defendant as well.

Finally, the court finds defendant's use does not fit within the special guidelines approved by Congress as to fair use in the educational context. See Notes of Committee on the Judiciary, House Rep. No. 94-1476, *reprinted in* 17 U.S.C.A. pp. 113-14; *Marcus v. Rowley*, 695 F.2d 1171, 1178 (9th Cir.1983). Defendant's copying and use of the works was not restricted to one copy for her own use in teaching. Additionally, the undisputed evidence shows defendant's copying was not limited and spontaneous, but was extensive and methodical, and consisted of copying from the same author, time after time. This is clearly not within the letter or spirit of the Congressional guidelines.

Under the circumstances of this case, and after balancing the four statutory factors, as well as the Congressional guidelines on fair use in the educational context, the court finds

as a matter of law that defendant is not entitled to fair use protection. See *Marcus*, 695 F.2d at 1178-79 (summary judgment may be granted on the fair use issue); *Hustler Magazine*, 796 F.2d at 1150-51 (same).

5. Permanent injunction

Plaintiffs have requested permanent injunctive relief on the four claims at issue. As plaintiffs are entitled to summary judgment on those claims, the court will grant such relief. See 17 U.S.C. § 502 ("[a]ny court having jurisdiction of a civil action arising under this title may ... grant ... final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright"); Cal.Civ.Code § 3426-2(a) ("[a]ctual or threatened misappropriation [of a trade secret] may be enjoined"); *Chicago Lock Co. v. Fanberg*, 676 F.2d 400, 404 (9th Cir.1982) (common law trade secret misappropriation enjoined under purview of 'unfair competition' under Cal.Civ.Code § 3369); see generally *A & M Records v. Heilman*, 75 Cal.App.3d 554, 142 Cal.Rptr. 390, *appeal dismissed and cert. denied* 436 U.S. 952, 98 S.Ct. 3063, 57 L.Ed.2d 1118 (1978) (affirming grant of motion for summary judgment and injunction as to defendant's unauthorized copying and sale of tape recordings).

IT IS SO ORDERED.



Thomas F. MILLER and Monica
O. Miller, Plaintiffs,

v.

DEPARTMENT OF the INTERIOR, BUREAU OF RECLAMATION; Manual Lujan, Jr., Secretary of the Interior, Defendants.

No. CV-S-93-220-PMP (LRL).

United States District Court,
D. Nevada.

June 28, 1993.

Employee brought age discrimination action against Department of Interior, and

Department moved for summary judgment. The court, Pro, J., held that the employee's motion for summary judgment was premature because the employee had not exhausted administrative remedies. The court granted the motion for summary judgment.

Motion granted.

1. Administrative 229

Civil Rights

Under Age Discrimination Act (ADEA), 29 U.S.C. § 621, an employee's appeal to exhaust administrative remedies is required before filing a civil action. The court held that the employee's initial complaint was not rendered moot by the initial complaint. The court granted summary judgment on the initial complaint. Employment Act (ADEA) amended, 29 U.S.C. § 621.

2. Administrative 229

Civil Rights

Under Age Discrimination Act (ADEA), 29 U.S.C. § 621, an employee's appeal to exhaust administrative remedies is required before filing a civil action. The court held that the employee's initial complaint was not rendered moot by the initial complaint. The court granted summary judgment on the initial complaint. Employment Act (ADEA) amended, 29 U.S.C. § 621.

Andrew H. G. El Cajon, CA, f

Monte N. Ste Savett, Asst. U.S. defendants.

PRO, District Court, Before the Court Dismiss (# 19) filed their (

1. Both parties have filed this lawsuit. All

Rule 11 prohibits "frivolous filings" and the use of judicial procedures as a tool for 'harassment.'" *Hudson v. Moore Business Forms, Inc.*, 836 F.2d 1156, 1159 (9th Cir.1987) (citation omitted). "An objective standard of reasonableness is applied to determinations of frivolousness as well as improper purpose.... [B]ecause of the objective standard applicable to Rule 11 analyses, a complaint that is found to be well-grounded in fact and law cannot be sanctioned as harassing, regardless of the attorney's subjective intent." *Id.* (citations omitted).

Section 1927 provides for sanctions against an attorney who "multiplies the proceedings in any case unreasonably and vexatiously." The statute only authorizes sanctions against Cassity in his capacity as attorney for New Alaska, see *FTC v. Alaska Land Leasing, Inc.*, 799 F.2d 507, 510 (9th Cir.1986), and only in an amount up to the additional expenditures incurred by Guetschow as a result of the multiplicity of the proceedings, see *United States v. Blodgett*, 709 F.2d 608, 610-11 (9th Cir.1983). Sanctions pursuant to section 1927 must be supported by a finding of subjective bad faith. See *Estate of Blas ex rel. Charguaf v. Winkler*, 792 F.2d 858, 860 (9th Cir. 1986); *Barnd v. City of Tacoma*, 664 F.2d 1339, 1343 (9th Cir.1982). "Bad faith is present when an attorney knowingly or recklessly raises a frivolous argument or argues a meritorious claim for the purpose of harassing an opponent." *Estate of Blas*, 792 F.2d at 860 (citations omitted). Tactics undertaken with the intent to increase expenses, see *Barnd*, 664 F.2d at 1343, or delay, see *McConnell v. Critchlow*, 661 F.2d 116, 118 (9th Cir.1981), may also support a finding of bad faith. Even if an attorney's arguments are meritorious, his conduct may be sanctionable if in bad faith. *Lone Ranger Television, Inc. v. Program Radio Corp.*, 740 F.2d 718, 727 (9th Cir.1984).

We believe that appellants' arguments were not so frivolous as to meet the standard applicable to Rule 11 sanctions. Our review of the record also fails to disclose evidence that Cassity "knowingly or recklessly" raised arguments that were friv-

olous or made for the purpose of harassment sufficient to support section 1927 sanctions. Accordingly, we reverse the district court's award of sanctions against Cassity.

AFFIRMED IN PART, REVERSED IN PART.



RELIGIOUS TECHNOLOGY CENTER,
CHURCH OF SCIENTOLOGY INTERNATIONAL, INC., et al., Plaintiffs-Appellants,

v.

Robin SCOTT, et al.,
Defendants-Appellees.

No. 87-5766.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Sept. 16, 1988.

Decided March 10, 1989.

Exclusive licensee and church brought action against alleged copyright infringers that used allegedly infringing documents in their church and religious practice. Licensee and church moved for preliminary injunction. The District Court for the Central District of California, 660 F.Supp. 515, Mariana R. Pfaelzer, J., denied motion and church appealed. The Court of Appeals, William A. Norris, Circuit Judge, held that prior determination that church's scriptures did not qualify as trade secrets did not establish law of the case.

Reversed and remanded.

Cynthia Holcomb Hall, Circuit Judge, dissented and filed opinion.

1. Federal Courts ⇐573

District court's denial of temporary restraining order and order to show a cause

was appealable, a nonevidentiary which all parties denial tantamountary injunction.

2. Federal Court

Court of Appeals that church scriptures trade secrets unchurch did not establish a commercial activity did not establish whether church preliminary injunction scriptures had other state law rival church.

Earle C. Coolidge & Jones, Boston, Plaintiffs-Appellants.

Jerrold Fagell, Los Angeles, Cal. and Powell, Carpin, Appellees.

Appeal from the Court for the Central District of California.

Before NORRIS, Circuit Judge, and KOZINSKI, Circuit Judge.

WILLIAM A. NORRIS, Circuit Judge:

This appeal was argued by the appellants ("Church") against the appellees ("Civilization")² ("Civilization") of the litigation. The appellants allegedly stole the scriptures of the New Church.³ The district court granted a preliminary injunction.

1. Formally, the Religious Technology Center, Church of Scientology International, California, which is suing the Church of Scientology, Ron Hubbard, et al., plaintiffs/appellees.

2. Defendants/appellees are the New Civil

was appealable, insofar as denial was after a nonevidentiary adversary hearing at which all parties were represented, making denial tantamount to denial of a preliminary injunction. 28 U.S.C.A. § 1292(a)(1).

2. Federal Courts ⇐950

Court of Appeals' prior determination that church scriptures did not qualify as trade secrets under California law, because church did not claim that scriptures gave it a commercial advantage over competitors, did not establish the law of the case as to whether church could be entitled to a preliminary injunction once it claimed that scriptures had economic value or on any other state law theories advanced against rival church.

Earle C. Cooley, Cooley, Manion, Moore & Jones, Boston, Mass., for plaintiffs-appellants.

Jerold Fagelbaum, Shea & Gould, Los Angeles, Cal. and Gary M. Bright, Bright & Powell, Carpinteria, Cal., for defendants-appellees.

Appeal from the United States District Court for the Central District of California.

Before NORRIS, HALL and KOZINSKI, Circuit Judges.

WILLIAM A. NORRIS, Circuit Judge:

This appeal arises out of litigation initiated by the Church of Scientology¹ ("Church") against the Church of the New Civilization² ("New Church"). The focus of the litigation is certain scriptural material allegedly stolen from the Church by the New Church.³ Early in the litigation, the district court granted the Church a preliminary injunction restraining the New

1. Formally, the plaintiffs and appellants are Religious Technology Center, Church of Scientology International, Inc. and Church of Scientology California, which are related entities constituting the Church of Scientology founded by L. Ron Hubbard. For convenience, we refer to the plaintiffs/appellants collectively as the Church.
2. Defendants and appellees are the Church of the New Civilization and various individuals

Church from using the disputed scriptures. That injunction was vacated on appeal. *Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1084, 1089-91 (9th Cir.1986), ("*Wollersheim*"), cert. denied, 479 U.S. 1103, 107 S.Ct. 1336, 94 L.Ed.2d 187 (1987). The Church then filed a second application for interlocutory relief, which was denied by the district court on the ground that it was foreclosed by *Wollersheim*. The Church now appeals that denial. We reverse and remand to the district court for further proceedings in light of this opinion.

I

BACKGROUND

In its complaint, the Church stated claims against the New Church for racketeering under the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1962(c)) ("*RICO*"), trademark infringement under federal and common law, unfair competition, receipt of stolen property, and various other state law claims. The Church sought damages as well as injunctive relief to prevent the New Church from disseminating the contents of scriptural materials which the Church claimed had been stolen from its Denmark offices by adherents of the New Church.

In an Ex Parte Application for Temporary Restraining Order ("*TRO*") and Order to Show Cause ("*OSC*"), the Church sought interlocutory relief on the ground that its scriptures were trade secrets and that it would suffer irreparable harm if its trade secrets were disseminated by another organization such as the New Church. The Church did not characterize the alleged harm as commercial or economic, but rather characterized it as "spiritual" harm. Essentially, the Church argued that its adherents

involved with the Church of the New Civilization. For convenience, we refer to the defendants/appellees collectively as the New Church.

3. See generally, *Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1077-79 (9th Cir. 1986), cert. denied, 479 U.S. 1103, 107 S.Ct. 1336, 94 L.Ed.2d 187 (1987) for discussion of the underlying facts in this litigation.

urpose of harass-
ort section 1927
ve reverse the dis-
sanctions against

, REVERSED IN

STEM

LOGY CENTER,
OLOGY INTER-
al., Plaintiffs-App-

et al.,
pellees.

66.

of Appeals,
uit.

Sept. 16, 1988.
10, 1989.

d church brought
yright infringers
ing documents in
practice. Licen-
or preliminary in-
ourt for the Cen-
660 F.Supp. 515,
denied motion and
ourt of Appeals,
udge, held that
church's scrip-
trade secrets did
case.

led.

ll, Circuit Judge,
n.

of temporary re-
to show a cause

ents would suffer irreparable spiritual injury if the New Church were free to disseminate the disputed materials. See *Wollersheim*, 796 F.2d at 1079.

The district court granted the Church a TRO and later extended it to a preliminary injunction, prohibiting the New Church from "using, distributing, exhibiting or in any way publicly revealing" the scriptures. *Id.* The preliminary injunction was based on the district court's finding that the scriptures were trade secrets and entitled to protection under both RICO and California law.

On appeal, we vacated the preliminary injunction. We held that the scriptures did not qualify as trade secrets under California law because of the failure of the Church to claim that the scriptures had any commercial value. We rejected the Church's argument that the scriptures qualified as trade secrets because of their spiritual value. *Id.* at 1090-91.⁴

The Church returned to the district court and filed a second Ex Parte Application for Temporary Restraining Order and Order to Show Cause, again asking the court to restrain the New Church from using the scriptural materials. This time, the Church argued that the scriptures qualified as trade secrets because they had economic value. Specifically, the Church contended that if the New Church was not enjoined from using the scriptures, "[p]laintiffs will be forever at a loss to protect the confidential nature and resultant economic value of these materials. Defendant will obtain an economic advantage that they would not otherwise possess which will be used to divert parishioners, the value and goodwill of which cannot be monetarily measured for plaintiffs." Excerpt of Record ("E.R."), Vol. 1:347 at 29. (Emphasis added.) After a hearing, the district court denied the application "solely based upon

4. In *Wollersheim*, we also held that the Church's RICO claim could not provide the basis for injunctive relief. *Id.* at 1077.

5. 28 U.S.C. § 1292(a)(1) provides: "[T]he courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of

the Ninth Circuit's ... decision [in *Wollersheim*]." *Id.* Vol. 3:421 at 2.

II

JURISDICTION

This court may hear appeals from interlocutory orders of the district court which grant, continue, modify, refuse or dissolve injunctions. 28 U.S.C. § 1292(a)(1).⁵ Ordinarily, an appeal does not lie from the denial of an application for a temporary restraining order; such appeals are considered premature and are disallowed "[i]n the interests of avoiding uneconomical piecemeal appellate review." *Kimball v. Commandant Twelfth Naval District*, 423 F.2d 88, 89 (9th Cir.1970).

We have recognized, however, that a denial of a TRO may be appealed if the circumstances render the denial "tantamount to the denial of a preliminary injunction." *Environmental Defense Fund, Inc. v. Andrus*, 625 F.2d 861, 862 (9th Cir.1980). See also *Kimball*, 423 F.2d at 89. In *Andrus* we held the denial of the TRO was tantamount to the denial of a preliminary injunction because of the presence of two factors: the denial of the TRO followed a "full adversary hearing" and "in the absence of review, the appellants would be effectively foreclosed from pursuing further interlocutory relief." *Id.*

[1] The rationale of *Andrus* applies with equal force to this appeal. Here the district court denied the Church's renewed application for a TRO and an OSC following a hearing at which all parties were represented. The transcript of the hearing and the court's written order denying the application make it unmistakably clear that the order was tantamount to a denial of a preliminary injunction. During the hearing, the district judge was emphatic in her

the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court; ..."

view that our decision closed any interlocutory grounds advance application: "I don't think the court feels that it is appropriate.... have anything more to say." E.R. at 6-7. In denying the application, the Ninth Circuit's decision, E.R. Vol. 3:421 at 421, a further hearing was nothing left under the circumstances, *Wollersheim*, that the district court's OSC was "tantamount to a preliminary injunction." Accordingly, the appealable under

LAW

The denial of the TRO is subject to a writ of *Colorado River* *Parker*, 776 F.2d 1000. We reverse the district court abuse of discretion decision on an error clearly established in the instant case. The instant case explained that she

6. Arguably, one could argue that a "black-letter hearing" is a condition to the appeal. We reject this view. The teaching of *Andrus* is appealable if the hearing is clearly the denial of a preliminary hearing, which is a non-evidentiary hearing; but a non-evidentiary hearing makes it clear that the district judge's ruling on the interlocutory review of party and judge is an evidentiary hearing.

The *New Church Foods, Inc. v. Andrus*, U.S. 423, 433 n. 1. L.Ed.2d 435 (1975) as an appeal from

view that our decision in *Wollersheim* foreclosed any interlocutory relief on the grounds advanced in the Church's new application: "I don't believe that the appellate court feels that in this case an injunction is appropriate.... I would say that we don't have anything much to talk about." Supp. E.R. at 6-7. In her written order she denied the application "solely based upon the Ninth Circuit's August 1986 decision...." E.R. Vol. 3:421 at 2. The futility of any further hearing was thus patent; there was nothing left to talk about. In these circumstances, we hold, as we did in *Andrus*, that the denial of the TRO and the OSC was "tantamount to the denial of a preliminary injunction." 625 F.2d at 862. Accordingly, the district court's order is appealable under 28 U.S.C. § 1292(a)(1).⁶

III

LAW OF THE CASE

The denial of a preliminary injunction is subject to a limited standard of review. *Colorado River Indian Tribes v. Town of Parker*, 776 F.2d 846, 849 (9th Cir.1985). We reverse the denial only when the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. *Id.* In the instant case, the district judge explained that she was basing her decision to

6. Arguably, one could read *Andrus* as laying down a black-letter rule that "a full adversary hearing" is a necessary, if not a sufficient, condition to the appealability of a denial of a TRO. We reject this wooden reading of *Andrus*. The teaching of *Andrus* is that a denial of a TRO is appealable if the circumstances make it unmistakably clear that the denial "is tantamount to the denial of a preliminary injunction." There the circumstances included "a full adversary hearing," which presumably means an evidentiary hearing; here the circumstances included a non-evidentiary adversary hearing at which all parties were represented. The record below makes it clear that an evidentiary hearing would have been pointless; in light of the district judge's ruling that *Wollersheim* barred all interlocutory relief, it would have been a waste of party and judicial resources to have conducted an evidentiary hearing.

The New Church argues that *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 433 n. 7, 94 S.Ct. 1113, 1121 n. 7, 39 L.Ed.2d 435 (1974) forecloses our treating this as an appeal from an order denying a prelimi-

deny the application for TRO and OSC—which we treat as the denial of a preliminary injunction—solely on our decision in *Wollersheim*. She interpreted *Wollersheim* as foreclosing interlocutory relief on any of the grounds raised by the Church in its second application, even though the Church advanced new state law theories and for the first time offered evidence that the scriptures in fact had economic value. Of particular importance to the instant appeal, the district court apparently interpreted *Wollersheim* as holding that the religious scriptures could not qualify as trade secrets under California law, regardless of whether they had commercial value.

[2] With all respect, we believe that the district court read more into *Wollersheim* than we intended. Putting aside that part of the opinion which addressed the Church's claim to injunctive relief under RICO, the remainder of the opinion was fairly narrowly drawn. The only question before the court was whether a religious scripture could qualify as a trade secret under California law if it conferred a spiritual, as opposed to an economic, advantage on its owner. We determined that California law did not recognize information as a trade secret unless it conferred on its owner an actual economic advantage over com-

nary injunction. We disagree. *Granny Goose* is simply inapposite. That case had nothing to do with the appealability of a denial of a TRO or any other question of appellate jurisdiction. It stands for the unremarkable proposition that a TRO issued by a state court remains in effect after removal to federal court only so long as it would under state law, notwithstanding the literal requirement of 28 U.S.C. § 1450 that all orders issued prior to removal remain in effect "until dissolved or modified by the district court." We fail to see how the holding of *Granny Goose* has any bearing on the issue of the appealability of the denial of the TRO in this case. However, we do agree with the New Church's apparent concern that we could not enjoin the use of the scriptures without giving the New Church a meaningful opportunity to file opposing papers and present evidence in a full adversary hearing. Whether this court may grant certain relief, however, is quite a different question from whether we have jurisdiction in the first place to review a TRO that is tantamount to a denial of a preliminary injunction.

petitors. 796 F.2d at 1091. Because the Church made no claim that the scriptures gave it a commercial advantage over its competitors, we held that the scriptures did not qualify as trade secrets under California law. *Wollersheim* turned, therefore, on the absence of any claim of economic advantage at the preliminary injunction stage. While we expressed doubts about whether the Church could allege the competitive market advantage required without "rais[ing] grave doubts about its claim as a religion and a not-for-profit corporation," *id.*, we did not decide one way or another whether the scriptures could qualify as trade secrets should the Church allege and prove economic advantage. Nor did we express any opinion as to whether the Church could be entitled to a preliminary injunction under any of the other state law theories advanced in its first application for interlocutory relief. Thus, *Wollersheim* did not establish the law of the case on either of these questions.

Accordingly, we REVERSE the district court's order denying the TRO and OSC and REMAND to the district court for further proceedings in light of this opinion. In so doing, we express no view as to whether the district court should exercise its discretion and decline to consider this second application for interlocutory relief on grounds that the Church is needlessly burdening the courts with repetitive applications for the same relief.

CYNTHIA HOLCOMB HALL, Circuit Judge, dissenting:

I agree that we have jurisdiction to hear this appeal and that the district court erred in construing our decision in *Wollersheim I* so broadly. I cannot join the majority opinion, however, because a remand to the district court for further evaluation of the appropriateness of preliminary relief constitutes an enormous waste of judicial resources.

In *Wollersheim I*, the Church of Scientology (the "Church") sought and obtained a preliminary injunction, based in part on its

claim that the Church of the New Civilization (the "New Church") stole its protected trade secrets. The Church alleged that New Church adherents took certain scriptural materials from the Church when they left to form the New Church. The Church, however, did not characterize the alleged harm as commercial or economic. Instead, the Church alleged only that its followers would suffer spiritual injury if the New Church was permitted to retain and use the scriptures. On appeal, we held that the Church's failure to allege or offer proof that the scriptures had economic value meant that the scriptures did not qualify as trade secrets under California law.

Following our decision, the Church returned to the district court to again seek an injunction against the New Church's use and distribution of the disputed scriptures. This time, however, the Church alleged that the scriptures had economic value: "Plaintiffs will be forever at a loss to protect the confidential nature and resultant economic value of these materials. Defendant will obtain an economic advantage that they would not otherwise possess which will be used to divert parishioners, the value and goodwill of which cannot be monetarily measured by plaintiffs." The district court denied this second request for preliminary injunctive relief, construing our decision in *Wollersheim I* as precluding an injunction before a final hearing on the merits.

The Church made a tactical choice not to allege in its original application that the scriptures had an economic value. The Church cannot now avoid the consequences of that choice by burdening the district court with a second application for preliminary relief, and this court with a second interlocutory appeal. Where the Church easily could have alleged in its initial application that the scriptures had an economic value, we should hold that it is estopped from appealing the denial of its subsequent application for preliminary relief under California trade secrets law.¹

tion for preliminary injunctive relief. We did not specifically analyze these other claims in

The doctrine times referred to in the opinion of the court prevent a party from recovering over the cost when such party would have a net positive impact. 1B Moore's 238-42 (2d Cir. 1977) lying preclusion are 'general administrative dignity of justice. v. Shamrock 1215 (9th Cir. 1977), 105 S.Ct. (citations omitted) intended to protect 'fast and local well Intern Atomic Met 1208, 1210 (9 Because it is rity of the uitable doctrine discretion.

I recognize cal case for judicial estoppel bar a party tion in a legal contradicts a same proceeding ally Note, J bishing of a L.Rev. 409, cluding In Doctrine of. Rev. 1244 (19 policies under

Wollersheim present case with comme the only arg support the tures confer Church and be at the Ch the relevance tions of con state law the

2. *Finley v. K* 874, 433 N.

1. The Church alleged several other state law theories of recovery in this and its prior applica-

The doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process. See 1B *Moore's Federal Practice* ¶.405[8], at 238-42 (2d Ed.1988). "The policies underlying preclusion of inconsistent positions are 'general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings.'" *Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1215 (9th Cir.1984), cert. denied, 469 U.S. 1197, 105 S.Ct. 980, 83 L.Ed.2d 982 (1985) (citations omitted). Judicial estoppel is "intended to protect against a litigant playing 'fast and loose with the courts.'" *Rockwell International Corp. v. Hanford Atomic Metal Trades Council*, 851 F.2d 1208, 1210 (9th Cir.1988) (citations omitted). Because it is intended to protect the integrity of the judicial process, it is an equitable doctrine invoked by a court at its discretion.

I recognize that this is not the prototypical case for invoking judicial estoppel. Judicial estoppel is most commonly applied to bar a party from making a factual assertion in a legal proceeding which directly contradicts an earlier assertion made in the same proceeding or a prior one. See generally Note, *Judicial Estoppel: The Refurbishing of a Judicial Shield*, 55 Geo.Wash. L.Rev. 409, 410-12 (1987); Comment, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 Nw.U.L. Rev. 1244 (1986)². Nevertheless, I find the policies underlying the doctrine of judicial

Wollersheim I. During oral argument in the present case, however, counsel for the Church, with commendable candor, acknowledged that the only argument made before this court to support the first injunction was that the scriptures conferred a spiritual advantage on the Church and its followers. The courts need not be at the Church's beck and call to now analyze the relevance, if any, of the Church's new allegations of commercial advantage to these other state law theories.

2. *Finley v. Kesling*, 105 Ill.App.3d 1, 60 Ill.Dec. 874, 433 N.E.2d 1112 (1982), is cited by the

estoppel to make this an equally appropriate case for its application.

Considerable judicial resources were expended in resolving the novel question of state law presented by the Church's original argument that information could be a trade secret if it conferred a spiritual advantage on its creator. But instead of laying the question of interlocutory relief to rest, our decision in *Wollersheim I* that California law protects trade secrets only if they have commercial value, simply prompted the Church to start the process all over again by arguing in a new application for a TRO that the scriptures did have commercial value after all. As a result of the Church's actions in pursuing two successive applications for injunctive relief, instead of a single application based upon alternative theories of spiritual and commercial value, there is no question but that the courts as well as the defendants have been needlessly burdened.

The integrity of the judicial process would be seriously undermined if every litigant could compel the courts to hear and decide repetitive requests for the identical relief. The Church should not be permitted to use the courts as a laboratory in which to experiment. The doctrine of judicial estoppel was fashioned to prevent just this sort of litigation strategy which plays fast and loose with the judicial process.



latter article as a paradigmatic case for the invocation of judicial estoppel. In *Finley*, a declaratory action filed by the former owner of the Oakland Athletics baseball team to resolve ownership interests in the family corporation, the plaintiff asserted that he was the beneficial owner of 71% of the stock. The court estopped him from taking that position because, in a divorce action eight years before, he had testified under oath that he owned only 31% of the stock and that his wife and children owned the rest. *Finley*, 105 Ill.App.3d at 10, 60 Ill.Dec. at 881, 433 N.E.2d at 1119.

UNITED STATES of America

v.

Mary Sue HUBBARD et al., Appellants.

UNITED STATES of America

v.

Mary Sue HUBBARD et al.

Church of Scientology of California,
Appellant.

CHURCH OF SCIENTOLOGY OF
CALIFORNIA, Appellant,

v.

UNITED STATES of America et al.

Nos. 79-2312, 79-2313 and 79-2324.

United States Court of Appeals,
District of Columbia Circuit.

Argued Feb. 21, 1980.

Decided July 24, 1980.

Supplemental Opinion Feb. 9, 1981.

Church and individual defendants appealed from orders entered by the United States District Court for the District of Columbia, Charles R. Richey, J., making publicly available all documents seized during searches of churches, denying motion by the church to intervene, and denying motion seeking immediate return of the seized documents and also seeking injunctive relief. The Court of Appeals, Wald, Circuit Judge, held that: (1) church had sufficient interest in papers seized during two searches of church buildings to be entitled to seek, by motion, return of such property and to apply for injunctive relief restraining public access to such documents; however, it was not appropriate for the church to seek from Court of Appeals writ of mandamus directing district court to refrain from unsealing such documents for public inspection; (2) district court had ancillary jurisdiction over claims of the church, as well as most claims made by individual defendants concerning the documents; and (3) seal of documents, which were introduced

under seal only in pretrial suppression hearing and only for purpose of showing that search and seizure were unlawful and which were not used in ruling on the suppression motion, should not have been lifted. After remand, the Court of Appeals entered a final judgment reversing the original unsealing order in which the appeals were taken, and remanded the case for reentry of an order.

Reversed and remanded.

MacKinnon, Circuit Judge, dissented and filed opinion.

1. Searches and Seizures ⇐5

Party from whom materials are seized in course of criminal investigation retains protectible property interest in the seized materials. U.S.C.A.Const. Amend. 4.

2. Constitutional Law ⇐274(5)

Fourteenth Amendment's protection against arbitrary or unjustifiable state deprivations of personal liberty prevents encroachment upon constitutionally recognized sphere of personal privacy, and Fifth Amendment's protection of liberty from federal intrusion upon privacy sphere is no less comprehensive. U.S.C.A.Const. Amends. 5, 14.

3. Searches and Seizures ⇐7(15)

Although public attributes of corporation may reduce pro tanto reasonability of their expectation of privacy, nature and purposes of corporate entity and nature of interest sought to be protected determines question whether, under given facts, corporation per se has protectible privacy interest. U.S.C.A.Const. Amend. 4.

4. Federal Courts ⇐527

Church had sufficient interest in papers seized during two searches of church buildings to be entitled to seek, by motion, return of such property and to apply for injunctive relief restraining public access to such documents; however, it was not appropriate for the church to seek from Court of Appeals writ of mandamus directing district court to refrain from unsealing such documents for public inspection. U.S.C.A.

Const. Amends. 5, 14; Fed.Rules Cr.Proc. Rule 47, 18 U.S.C.A.; Fed.Rules Civ.Proc. Rules 3, 8(a), 28 U.S.C.A.

5. Federal Courts ⇐21

District court, which ruled upon defendants' motion to suppress documents seized during searches of churches, had ancillary jurisdiction to hear claims asserted by the church, which sought to have papers not used in either criminal prosecution or in ruling on suppression motion returned under seal, of its property and privacy rights in such papers. U.S.C.A.Const. Amends. 5, 14; Fed.Rules Cr.Proc. Rule 47, 18 U.S.C.A.; Fed.Rules Civ.Proc. Rules 3, 8(a), 28 U.S.C.A.

6. Federal Courts ⇐21

Defendants' claims that permitting public access to documents, which were seized during two searches of churches but which were neither employed in criminal prosecution nor employed in ruling upon suppression motion, would vitiate benefits of possible reversal of convictions on appeal, would interfere with proceedings commenced and orders entered in other federal courts, would prejudice fair trial rights in other criminal proceedings, and would violate privacy rights of individuals mentioned or discussed in seized documents were not inextricably bound up in assessment of validity of judgments of conviction, and thus district court had ancillary jurisdiction over defendants' challenges to unsealing of such documents; however, claim that release of the documents would violate negotiated plea disposition could not be divorced from criminal proceedings with themselves, and thus such claim did not fall within ancillary criminal jurisdiction of district court.

7. Federal Courts ⇐554

Orders unsealing documents, which were seized during searches of churches but which were used in neither criminal proceeding nor in ruling on suppression motion, were separable from and collateral to rights of parties to the criminal proceedings, and thus such orders, which would allow irreparable damage to be done to privacy and

property interests asserted, were appealable.

8. Criminal Law ⇐1226(2)

Seal of documents, which were seized during searches of churches, which were introduced under seal only in pretrial suppression hearing and only for purpose of showing that search and seizure were unlawful, and which were not used in ruling on the suppression motion, should not have been lifted, absent showing of substantial factor favoring public access, where unsealing had not been shown to serve public's right of access to courts, no previous access had been shown, both church and individual defendants objected, and the documents had been seized from nonpublic areas of the churches. U.S.C.A.Const. Amends. 5, 14; Fed.Rules Cr.Proc. Rule 47, 18 U.S.C.A.; Fed.Rules Civ.Proc. Rules 3, 8(a), 28 U.S.C.A.

Appeals from the United States District Court for the District of Columbia (D.C. Criminal No. 78-401 and D.C. Civil Action No. 79-2975).

Earl C. Dudley, Jr., Washington, D. C., with whom Michael Nussbaum, Washington, D. C., was on brief, for appellants Hermann and Raymond.

Leonard B. Boudin, New York City, was on brief, for appellant Hubbard.

Philip J. Hirschkop, Alexandria, Va., was on brief, for appellants Heldt and Snider.

Roger Zuckerman, Washington, D. C., was on brief, for appellants Weigand and Willardson.

John Kenneth Zwerling, Alexandria, Va., was on brief, for appellant Wolfe.

Leonard J. Koenick, Washington, D. C., was on brief, for appellant Thomas.

Leonard B. Boudin, New York City, for appellant Church of Scientology of California.

Steven C. Tabackman, Asst. U. S. Atty., Washington, D. C., with whom Charles F. C.

Ruff, U. S. A. Asst. U. S. Atty., Washington, D. C., for appellants Fisher, Keith A. Fisher, Raymond A. Fisher, and Timothy A. Fisher, Washington, D. C., for appellee.

George K. Fisher, Washington, D. C., and James L. Fisher, Washington, D. C., were on brief, for appellant Water News Publishing Co.

Also, Ronald C. Fisher, Washington, D. C., entered an appearance for appellants Hermann and Raymond.

Leonard S. Fisher, Alexandria, Va., was on brief, for appellants Gennet, Alexander Gennet, and Alexander Gennet, for appellants Gennet and Alexander Gennet.

Roger Spae, Washington, D. C., was on brief, for appellants Weigand and Willardson.

Richard McFarland, Washington, D. C., entered an appearance for appellants Heldt and Snider.

Before ROBERT W. WALD, Circuit Judge.

Opinion for the Court by ROBERT W. WALD, Circuit Judge.

1. *United States v. Hubbard*, 478 F.2d 1000 (D.C. Oct. 1973), cert. denied, 413 U.S. 832 (1973). The district court's response to the criminal defendant's motion for summary judgment was denied on which the district court's decision to order summary judgment was affirmed. The rationale of the district court's motion for summary judgment was a second order of summary judgment appealed here. The district court's consideration was based on the nondisclosure of the defendant's motion for summary judgment prior to the hearing on the motion for summary judgment. The individual defendants are reprinted in the appendix in the opinion of the court as Hubbard.

Ruff, U. S. Atty., Carl S. Rauh, Principal Asst. U. S. Atty., John A. Terry, John R. Fisher, Keith A. O'Donnell, Michael W. Farrell, Raymond Banoun, Judith Hetheron and Timothy J. Reardon, III, Asst. U. S. Attys., Washington, D. C., were on brief, for appellee.

George K. Rahdert, St. Petersburg, Fla., and James L. Yacavone, III, Clearwater, Fla., were on brief, for amici curiae Clearwater Newspapers, Inc. and Times Publishing Co.

Also, Ronald G. Precup, Washington, D. C., entered an appearance, for appellants Hermann and Raymond.

Leonard S. Rubenstein and Geraldine R. Gennet, Alexandria, Va., entered appearances, for appellants Heldt and Snider.

Roger Spaeder and Lawrence A. Katz, Washington, D. C., entered appearances, for appellants Weigand and Willardson.

Richard McMillin, Washington, D. C., entered an appearance, for appellant Thomas.

Before ROBINSON, MacKINNON and WALD, Circuit Judges.

Opinion for the Court filed by Circuit Judge WALD.

1. *United States v. Hubbard*, Cr. No. 78-401 (D.D.C. Oct. 25, 1979). The consolidated appeals argued to this panel are from four orders of the district judge. The first was entered in response to a motion filed by the individual criminal defendants to seal the stipulated record on which the trial was to occur. The motion was denied and the judge took the occasion to order the unsealing of the documents at issue here. That order is cited above and offers the rationale quoted in the text. The defendants' motion for reconsideration was denied in a second order entered October 30, 1979, also appealed here. Although the motion for reconsideration was denied, the court in a memorandum order responded to several arguments for nondisclosure raised by the defendants and expressed an intention to screen the documents prior to release to ensure against "an unwarranted invasion of privacy" of "innocent third-parties." These two orders are appealed by the individual defendants, Docket No. 79-2312, and are reprinted in the joint appendix filed in that case at 171 and 223, respectively. [The joint appendix in No. 79-2312 is hereinafter referred to as Hubbard App.]

Dissenting opinion filed by Circuit Judge MacKINNON.

WALD, Circuit Judge:

We confront the issue here of whether and on what grounds a district court judge may make available to the public papers seized from a third party nondefendant, subsequently introduced under seal only in a pretrial suppression hearing and only for the purpose of showing that the search and seizure were unlawful. As far as we have been able to determine, there is no precedent on the issue. The seized documents were made available to the public on the eve of the defendants' convictions under a disposition agreement and at a time when the trial judge's ruling denying suppression of the seized materials was certain to be appealed. Three reasons were given for making these documents publicly available: "there is a right in the public to know what occurs before the courts;" "there is a public interest in access to court records;" and "sunshine is the best disinfectant."¹ When the unsealing decision was announced, the third party nondefendant sought but was denied leave to intervene to assert its interest in retaining the documents under seal. It then moved the court for immediate return of the documents and for an order temporarily enjoining public access pending

The third and fourth orders are the subject of appeals by the Church of Scientology of California (the "Church"). The third order, entered October 31, 1979, denied the Church's motion to intervene in the criminal case to assert its interest in retaining the documents under seal; the order is appealed in No. 79-2313. The fourth order, rendered orally November 2, 1979, in a proceeding assigned to the same judge but docketed in the district court as a separate civil action, dismissed the Church's motion for return of property and application for an order temporarily restraining public access to the documents unsealed pending their return; the order is appealed in No. 79-2324. Transcript of Proceedings, *Church of Scientology of Cal. v. United States*, Civ. No. 79-2975 at 51-56. The order denying intervention and the transcript of the proceedings in open court at which the Church's motion for return of property and application for a temporary restraining order were denied are reprinted in the appendix filed by the Church in Nos. 79-2313 & 79-2324 as documents (Docs.) 9 and 11, respectively. [The Church's appendix in Nos. 79-2313 & 79-2324 is hereinafter referred to as Church App.]

their return. These motions were also denied.

After studying the matter in depth, we have determined to stay the unsealing orders appealed in No. 79-2312, to vacate the orders denying intervention and temporary injunctive relief appealed in Nos. 79-2313 and 79-2324,² and to remand to the trial court for supplemental proceedings and transmission to this court of a more particularized rationale, under guidelines discussed below. We retain jurisdiction over the matter and order all documents at issue here sealed pending our decision following remand.³

2. We vacate the orders denying intervention and temporary injunctive relief because we treat the various means by which the Church sought to assert its interests in the district court as having commenced a proceeding within the trial court's ancillary jurisdiction. See text at notes 63-65, *infra*. As noted in the text, *infra*, at note 67, we do not reach the question whether a nonparty may ever intervene in a criminal case. For the reasons given *infra*, note 63, we affirm that portion of the order appealed in No. 79-2324 which may be read to deny on the merits immediate return of the seized documents.

3. We choose to retain jurisdiction with the virtual certainty that a simple remand would result in a second appeal regardless of the trial judge's ultimate decision. Our purpose is twofold. First, we hope to obviate the proliferation of motions and collateral proceedings which has characterized the litigation of this and other issues related to these criminal proceedings, a profusion of paper which has sorely tried the patience of this court and the district court. Second, we seek to ensure that the documents remain under seal until the matter is again before this court. If upon reconsideration the district court determines not to release any documents or if the parties determine not to contest the district court's ultimate decision, the parties should so inform this court.

4. There seems to be general agreement that the number of documents unsealed was approximately half the total seized, but exactly how many documents were seized and how many were unsealed is unclear. Brief for Appellants in No. 79-2312 at 10 (suggesting that 50,000 pages are still under seal); *id.* at 11 (suggesting that 50,000 pages were unsealed by order here appealed); Appellants' Emergency Application

I. BACKGROUND

Owing to the litigiousness of the parties the full procedural background of these appeals is quite complex, but the essential facts are simply stated. Close to three years ago the government seized approximately 50,000 documents⁴ from two Los Angeles sites of the Church of Scientology of California. A motion made by the Church to return the documents was dismissed by a federal district court in California,⁵ although various actions of the parties and the courts in California restricted public access to the documents held by or subject to the proceedings of that court.⁶

for *En Banc* Rehearing in Nos. 79-2312 & 79-2313 at 1 (filed Nov. 2, 1979) (judge's order unseals "roughly 50,000 pages"); Church's Petition for Writ of Mandamus, *In re Church of Scientology of Cal.*, No. 79-2318 (D.C.Cir. filed Nov. 9, 1979) at 3 (total documents seized number approximately 48,000); *Church of Scientology of Cal. v. United States*, 591 F.2d 533 (9th Cir. 1979), *cert. denied*, 444 U.S. 1043, 100 S.Ct. 729, 62 L.Ed.2d 729 (1980) ("Church asserts that more than 20,000 documents were seized") (unclear whether figure represents California searches only or combined total of California and District of Columbia searches). It suffices for our purposes to say that the number of documents seized was very large.

5. The motion was made in the district court for the Central District of California under Rule 41(e), Fed.R.Crim.P. That rule provides that:

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized.

If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress.

.....
The California district court's memorandum decision finally dismissing the motion was entered July 5, 1978. *Church of Scientology of Cal. v. United States*, No. CV-77-2565-MML (C.D.Cal. Jul. 5, 1978), Hubbard App. at 37.

6. For two months after the seizure the seized material remained in the exclusive custody of

Note 6—Continued
the government
California district
41(e) motion
seized materials
that court wh
District of Co
the Church's
of a search ex
of the same i
the Founding
District of Colum
district court
Dated July 4,
Aug. 24, 1979
a warrant "vir
lee in No. 79-
in Nos. 79-23
warrant under
facially incor
district judge, r
collateral est
on the consti
issue," *Unitec*
No. CV-77-25
Aug. 8, 1977)
order requir
materials seiz
App. at 2, but
from the Dis
decision and
ed" in the int

When a par
ing of facial
Dated July 4,
cert. denied,
L.Ed.2d 519 (1
reopened the
jecting severa
ordered the p
turned to the
governmental
ing their disc
Scientology o
77-2565-MML
bard App. a
government v
approximately
California sea
documents se
turn to the C
referred to as

Apparently
preserve an a
seized, either
mination or f
the governme
stipulation (t
bard App. at
partial return
der seal to th
of one copy
There is some
were actually
ment, but it
California dis
over copies

Cite as 650 F.2d 293 (1980)

Note 6—Continued

the government. On August 8, 1977 the California district court to whom the Church's Rule 41(e) motion had been assigned ordered the seized material "impounded" by the clerk of that court while an appeal was taken in the District of Columbia courts from a holding in the Church's favor concerning the lawfulness of a search executed the same day, and as part of the same investigation, on the premises of the Founding Church of Scientology in the District of Columbia. The District of Columbia district court decision, *In re Search Warrant Dated July 4, 1977*, Misc. No. 77-151 (D.D.C. Aug. 24, 1979), Church App. Doc. 12, held that a warrant "virtually identical" (Brief for Appellee in No. 79-2312 at 1, n.1; Brief for Appellee in Nos. 79-2313 & 79-2324 at 1 n.1) to the warrant underlying the California searches was facially unconstitutional. The California district judge, reasoning that "the principle of collateral estoppel precludes further litigation on the constitutionality of the warrant here at issue," *United States v. Various Documents*, No. CV-77-2565-MML, slip op. at 1 (C.D. Cal. Aug. 8, 1977), Hubbard App. at 1, entered an order requiring the return to the Church of the materials seized in California, *id.* at 2, Hubbard App. at 2, but stayed this order pending appeal from the District of Columbia district court decision and ordered the materials "impounded" in the interim. *Id.*

When a panel of this court reversed the finding of facial invalidity, *In re Search Warrant Dated July 4, 1977*, 572 F.2d 321 (D.C. Cir. 1977), cert. denied, 435 U.S. 925, 98 S.Ct. 1491, 55 L.Ed.2d 519 (1978), the California district court reopened the Rule 41(e) proceedings and, rejecting several arguments made by the Church, ordered the previously impounded materials returned to the government, permitting limited governmental use of the materials but prohibiting their disclosure to the public. *Church of Scientology of Cal. v. United States*, No. CV-77-2565-MML (C.D. Cal. Apr. 4, 1978), Hubbard App. at 6, 30. Shortly thereafter the government voluntarily returned to the Church approximately half the documents seized in the California searches. (See note 17, *infra*.) [The documents selected by the government for return to the Church are sometimes hereinafter referred to as the "returned" documents.]

Apparently because the parties wished to preserve an accurate record of the documents seized, either for appeal of the Rule 41(e) determination or for use in collateral proceedings, the government and the Church entered into a stipulation (the "surrender stipulation," Hubbard App. at 35), on the eve of the documents' partial return, providing for the surrender under seal to the district court clerk in California of one copy of the documents to be returned. There is some dispute about which documents were actually surrendered under this arrangement, but it appears that at some point the California district court clerk obtained custody over copies of both the "returned" and the

"non-returned" documents. The dispute's importance derives from a subsequent stipulation and order (the "transfer stipulation," Hubbard App. at 88) transferring to the custody of the District of Columbia district court the documents held by the clerk of the California district court. The documents so transferred were "to remain sealed" except to "be viewed by Judge Richey . . . in the pre-trial suppression hearings." *Id.* The stipulation described the documents to be transferred and kept under seal as follows: "the documents seized pursuant to the two Los Angeles search warrants, which are the subject of the above-captioned case [the 41(e) motion], and which are currently kept sealed in the custody of the Clerk of this [the California] Court pursuant to the [surrender] stipulation . . ." *Id.* In fact what was transferred from the district court comprised not only the returned documents but all documents seized. Transcript of Proceedings in *United States v. Hubbard*, Cr.No. 78-401 (D.D.C.) (Tr.) Aug. 17, 1979 at 15-16 (government making this assertion). Thus the question is posed whether all documents actually transferred were subject to the sealing stipulation and order.

We find as a matter of law that the "surrender" and "transfer" stipulations governed only the terms of custody of the returned documents and that the stipulations did not, by themselves, oblige the District of Columbia district court to retain the non-returned documents under seal. Thus any *de jure* seal on these documents must arise out of the independent actions of the parties and of the district court in the District of Columbia, and the propriety of the court's unsealing order will be considered without regard to considerations of comity that may be appropriate where the order of a coordinate jurisdiction is involved. See generally *Covell v. Heyman*, 111 U.S. 176, 182, 4 S.Ct. 355, 358, 28 L.Ed. 390 (1884).

Some two weeks after the surrender stipulation was entered, but months before the transfer stipulation, the California district court disposed of some remaining issues in the Rule 41(e) proceeding and removed the restrictions previously placed on the government's use of seized materials. *Church of Scientology of Cal. v. United States*, No. CV-77-2565-MML slip op. at 21 (Jul. 5, 1978), Hubbard App. at 37, 57. A stay of this order was sought and denied in the circuit court but in response to a separately filed (July 12, 1978) application, the circuit court entered an order prohibiting the government, "pending appeal," from publicly disclosing the documents. *Church of Scientology of Cal. v. United States*, No. 78-2434 (9th Cir. Oct. 30, 1978), Church App. Doc. 4. The order, which originally permitted the government only to present the seized materials to federal grand juries, was modified December 13, 1978 to permit use of the materials "at resulting criminal proceedings." *Id.* (Dec. 13, 1978), Hubbard App. at 66. On February 22, 1979, the Ninth

More than two years after the seizures a District of Columbia grand jury returned indictments against eleven officials or employees of the Church. Seeking to suppress the seized documents as the fruits of an illegally executed "general" search, the nine defendants present before the court⁷ urged Judge Richey, to whom the criminal case was assigned, to examine a complete set of the documents seized. Because they were needed for this purpose, copies of all docu-

ments held by the district court in California were transferred to the custody of the district court here. From the discussions preceding transfer it is clear that everyone concerned was under the impression that all documents to be transferred would be held under seal by the clerk of this court.⁸ No separate written sealing order was entered, but before the transfer took place, Judge Richey entered repeated oral sealing orders,⁹ although usually with the caveat that

Note 6—Continued

Circuit dismissed the Church's appeal for want of jurisdiction. *Church of Scientology of Cal. v. United States*, 591 F.2d 533 (9th Cir. 1979), cert. denied, 444 U.S. 1043, 100 S.Ct. 729, 62 L.Ed.2d 729 (1980).

The Church and the individual defendants here argue that because the Ninth Circuit's orders placed restrictions on the documents' use "pending appeal," the orders survived that court's dismissal for want of jurisdiction and continued at least until certiorari was denied. We disagree. We think that "pending appeal" meant pending appeal from the order already entered in the district court on the basis of which the circuit court's jurisdiction depended and did not include the filing of a petition for certiorari, even though a circuit court may stay the issuance of its mandate until a petition for certiorari is denied. See Fed.R.App.P. 41(b). Moreover, we read the orders to address the government's use of the documents and not the court's; the propriety of a court's unsealing order once the materials were properly received in a "resulting criminal proceeding" must thus be determined independently.

Assuming those documents not required to be surrendered were in fact given over to the California district court clerk at about the time the "surrender stipulation" was entered, there would seem to be a period from June 20, 1978 or at least from July 5, 1978 (when the district court indicated its wish not to exercise further control over the documents) until July 20, 1979 when the non-returned documents may not technically have been under seal. But given the confusion surrounding the initial stipulation, their actual accessibility to the public is questionable. See Tr. Jul. 20, 1979 at 6015, 6018 (government apparently asserting that all documents were kept by clerk in separate safe under seal). The parties have presented nothing to show that the public was in fact permitted access to the documents held by the California district court.

7. Extradition proceedings had been initiated in Great Britain against the two other individuals accused who were not in this country. Those proceedings culminated with an unsuccessful appeal by the accused to the House of Lords and we take notice of the fact that they have

now been brought before the district court on the indictment returned by the District of Columbia grand jury.

8. We find determinative the following exchange, occurring during the course of the taking of testimony in connection with the suppression motion:

MR. BANOUN [Assistant United States Attorney]: . . . It was after the 41(e) proceeding was completed that the government and the petitioner voluntarily entered into a stipulation to keep a copy of all the documents under seal, in the custody of the clerk of this court.

THE COURT: In the transfer to our court in Washington, there are no restrictions on that transfer, are there, except they are—
MR. BANOUN: Sealed.

MR. BOUDIN: They are sealed, and they are for your view.

THE COURT: All right.

MR. BANOUN: It is one set, one copy of all the documents seized.

THE COURT: And that is the only place where you have, anybody has—

MR. BANOUN: A complete copy. It is not the only place where anybody has it, because the defense—not the defense, but the surety has [a complete copy].
Tr. Jul. 20, 1979 at 6012-14.

9. It appears that the returned documents were offered and accepted for review before actual copies of those documents were presented to the court. Tr. Jul. 18, 1979 at 5425-28:

THE COURT: Can we have an understanding, Mr. Hirschkop—

MR. HIRSCHKOP [counsel for the defendants Heldt and Snider]: Yes.

THE COURT:—between you and your co-counsel that those documents may be made a part of the official record of the evidence in these three suppression motions?

MR. HIRSCHKOP: Under seal, yes, sir.

THE COURT: Subject to the same caveat the Court received all the others.

MR. HIRSCHKOP: Well, I am a little hesitant to give the Court 20,000 documents and then say or have the Court say, "Without consulting you or giving you a chance to be heard, I will open the whole thing up."

he retained the documents at a late

The legal consequences by the defense

I trust the may not und time the Co such an opin

These are the persons the problem. der all their everything u protect their them availab

THE COU this case?

MR. HIRS THE COU MR. HIRS THE COU

who will ob defense side your right to lost for naug

MS. HETH Attorney): Y THE COU chief counse

MR. BAN THE COU like I treat M the defense.

THE COU them as pa MR. BAN having—

THE COU MR. BAN we have kept THE COU MR. BAN THE COU

tion to the c ing to be re can see that

THE CLE documents THE COU The general

been that the the trial court documents.

10. One ration the district ju he retained di was as follow

[The Court now, with th at the discr cause the (

he retained the right to "unseal" the documents at a later time.¹⁰

The legal consequence of the position taken by the defendants in pressing the full set

of documents upon the trial judge during the suppression hearing is that the documents became part of the "record" of the case.¹¹ We think this conclusion is consist-

I trust the Court's good faith, but the Court may not understand the point we have at the time the Court should or should not reach such an opinion.

These are 20,000 personal documents from the persons seized. Again, it comes back to the problem. Shall we force them to surrender all their rights to privacy by opening everything up in a public record in order to protect their right to privacy? So I will make them available to the prosecution voluntarily.

THE COURT: And part of the record in this case?

MR. HIRSCHKOP: Yes.

THE COURT: All right.

MR. HIRSCHKOP: All right.

THE COURT: Is there any other counsel who will object to that procedure on the defense side? If so, state it now. Otherwise, your right to object is forgiven and forever lost for naught. By your silence I-

MS. HETHERTON [Assistant United States Attorney]: Your Honor-

THE COURT: Let me ask Mr. Banoun as chief counsel for the prosecution.

MR. BANOUN: I'm not chief counsel.

THE COURT: Well, I treat you as such, like I treat Mr. Hirschkop as chief counsel for the defense.

THE COURT: Mr. Banoun, will you accept them as part of the record in this case?

MR. BANOUN: We have no objection to having-

THE COURT: All right.

MR. BANOUN: Also the documents which we have kept as part of the court file as well.

THE COURT: Any objection?

MR. BANOUN: So that every-

THE COURT: Any objection to that addition to the documentary evidence? I am going to be really popular with my clerk. You can see that now, can't you?

THE CLERK: We have included all the documents seized at this point?

THE COURT: That is correct.

The general understanding appears to have been that the stipulated transfer would provide the trial court with a complete set of the seized documents.

10. One rationale offered contemporaneously by the district judge for his repeated caveat that he retained discretion to unseal the documents was as follows:

[T]he Court is going to seal these documents now, with the caveat that they can be opened at the discretion of the Court. Why? Because the Court is going to have to make

reference to them in making findings, there is no question about that, as to whether or not this seizure was proper.

And the Court feels that while it has restricted the government at this particular stage they are entitled to know why I have done it. And the public also is entitled to know why I have done it.

Also, since the six attacks on the warrant and the seizure and the search, broadly stated and specifically stated, are complex and raise difficult issues, and the Court has endeavored, to the best of its ability, to extend the defense every conceivable opportunity it concedes proper, to let them put on any and all evidence that will be of assistance to the Court as well as argue.

But that does not mean that the government has had no rights, either. I am just suggesting that I think I understand the law about search and seizure pretty well, not that I cannot be educated further. All of us lawyers and judges have a lot to learn, and this judge is no exception.

So with that let's proceed, Mr. Banoun. Tr. Jul. 19, 1979 at 5868-69 (emphasis supplied).

11. Fed.R.App.P. 10(a); *United States v. Ross*, 321 F.2d 61, 65 n.2 (2d Cir.), cert. denied, 375 U.S. 894, 84 S.Ct. 170, 11 L.Ed.2d 123 (1963); Administrative Office of United States Courts, Manual for Clerks of United States District Courts §§ 201.1, 201.2(F)(1) (1978), ch. 13, Ex. 2 at 4-5 (1954) (classifying exhibits as "auxiliary case records"), cited in *United States v. Mitchell*, 551 F.2d 1252, 1259 & n.28 (D.C. Cir. 1976), rev'd on other grounds sub nom. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978). Whether the documents were or were not technically "received" in evidence is quite beside the point. For example, documentary materials offered but excluded by a trial judge on evidentiary grounds can be part of the "record" at least for purposes of appeal of the evidentiary ruling. 9 Moore's Federal Practice ¶ 210.04[3] at 10-18 (1980), citing *Chicago & E. Ill. R.R. v. Southern Ry.*, 261 F.2d 394, 402 (7th Cir. 1958); *Texas & Pac. Ry. v. Buckles*, 232 F.2d 257, 261 (5th Cir.), cert. denied, 351 U.S. 984, 76 S.Ct. 1052, 100 L.Ed. 1498 (1956). Nevertheless, to state that materials are part of the record of the case does not answer the question whether they are or should be public. This question we address below. Depending on the circumstances, technical receipt in evidence may or may not weigh heavily in determining the answer to this question.

ent with the contemporaneous understanding of the parties and the district court.¹² However, only a small number of the documents were referred to individually by nature or content by either witnesses in the suppression hearing or by the trial judge in his ultimate decision on the motion.¹³ It is in fact unclear whether and to what extent the trial judge examined the documents before he denied defendants' suppression motion.¹⁴

12. See exchange quoted *supra*, note 9.

13. The parties inform us that only 74 of the documents were used in the examination of witnesses at the suppression hearings. Reply Brief for Appellant in Nos. 79-2313 & 79-2324 at 3. The trial judge described only a handful in his memorandum opinion. *United States v. Hubbard*, 493 F.Supp. 209 at 231 (D.D.C.1979), Hubbard App. at 104, 145 (Red Box Data Information Sheet); *Id.* at 232, Hubbard App. at 146 (Government exhibit 111); *Id.* at 233, Hubbard App. at 148 ("Re: Herb").

An issue is made by the government of the admission in evidence at the suppression hearing of "an inventory breakdown" and a "computer printout" which were prepared in conjunction with a study conducted on defendants' behalf of the seized materials. The "inventory breakdown" classified 23,000 seized documents as within or without the warrant and grouped them into several categories. The "computer printout," comprising nine volumes, was apparently the basis for the "inventory breakdown." It contained a separate entry for each of the documents studied and an indication of whether it was within or without the warrant. We have examined both the "inventory breakdown" and the "computer printout" and do not find them revealing of the content of the documents surveyed.

14. Judge Richey decided, *inter alia*, that overbreadth of the search would not by itself taint the entire seizure, *United States v. Hubbard*, 493 F.Supp. 209 at 221-224 (D.D.C.1979), Hubbard App. at 126-31, and that documents seized within the scope of the warrant, *id.*, or in plain view, *id.* at 41, Hubbard App. at 144, during the course of the search need not be suppressed. He also determined, relying on his own view of the premises and the statements of witnesses present at the search, that the physical scope of the search was not unreasonable, *id.* at 31-36, Hubbard App. at 134-39, and that the government made reasonable efforts to limit the search. *Id.* at 36-44, Hubbard App. at 139-44. Finally, he found that none of the documents upon which the government intended to rely for its case-in-chief were outside the scope of the warrant. *Id.* 47-48, Hubbard App. at 150-51. Under this rationale examination of

Shortly after entry of the decision upholding the search, the government and the defendants negotiated a disposition of charges and a stipulated record consisting of approximately 200 documents. As part of the negotiations the government agreed not to disseminate publicly any documents seized which were not part of the stipulated record. The trial court enforced the negotiated disposition;¹⁵ the case was tried to the

all the documents seized may not have been necessary and there is no indication in the memorandum opinion that such an examination was undertaken. However, when the unsealing order was challenged and counsel for one defendant suggested to the court:

You are opening up now 12,000 to 15,000 documents that you have never read.

You have read a handful of them; not even one-tenth, not even one-hundredth of one per cent of those documents;

Judge Richey retorted:

That is a gratuitous statement which you have made and which I am not going to accept, and I don't think it is proper for you to make, because you don't know what I have read.

Tr. Oct. 26, 1979 at 56-57.

15. The defendants had moved for an order compelling the government specifically to perform a plea agreement. The court found that the government had in fact tendered a plea agreement, that the defendants had accepted the offer, and that the government would be bound by the offer made. *United States v. Hubbard*, Cr.No. 78-401 (D.D.C. Oct. 8, 1979), Hubbard App. at 157. The offer found by Judge Richey to have been made expressly contemplated appellate review of the convictions. *Id.* at 10, Hubbard App. at 166. As one defense counselor stated to Judge Richey on the day the verdicts were rendered, "the whole point of the plea agreement—the whole point of the plea agreement was to preserve for the defendants an appeal on the legality of the search and seizure." Tr. Oct. 28, 1979 at 8, Hubbard App. at 176. The trial judge's own understanding was the same. *Id.* at 21, Hubbard App. at 189. The agreement enforced expressly provided that the government could not make available either to the press or to private individuals copies of documents seized in California (apart from those contained in the stipulated record). *United States v. Hubbard*, Cr.No. 78-401, slip op. at 11 (D.D.C. Oct. 8, 1979), Hubbard App. at 167.

bench on the verdicts were

After the d forced but on dicts were ente order making ments seized e ment had earl as unnecessary were not also examination o hearing.¹⁶ W Church sough case to "prote the Church ar of their pape captioned as seeking imme

16. Each of t guilty of one were found g conspiracy to guilty under gally to obt one was foun ing theft of the point is n at notes 21- emphasizing appeal do no part of the convictions v

17. See *Unite* 209 at 233 (I (government ments "were the reasons clear, they m *Andresen v.* 96 S.Ct. 273 (approving t scope of the improperly *bard, supra,* ing "this pro in *Andresen*

18. The appr in the stipul those "unsea stand the un issue in thes

19. Church's the Court's (Alternative Determinatic *States v. Hu* Oct. 29, 1979 after cited a

bench on the stipulated record and guilty verdicts were returned.¹⁶

After the disposition agreement was enforced but one day before the guilty verdicts were entered, the trial judge issued an order making publicly available all documents seized except those that the government had earlier "returned" to the Church as unnecessary to the prosecution,¹⁷ if they were not also used by the defendants in the examination of witnesses at the suppression hearing.¹⁸ When this order was filed, the Church sought to intervene in the criminal case to "protect the constitutional rights of the Church and its members in the privacy of their papers;"¹⁹ it also filed a motion captioned as a separate civil proceeding, seeking immediate return of the seized doc-

uments and an order temporarily restraining the court clerk from disseminating or disclosing the documents to anyone pending a decision on the motion for return.²⁰ The individual defendants moved the court for reconsideration. These motions were denied. Applications by the Church and the individual defendants for stay of the unsealing order and a petition by the Church for mandamus relief were denied by motions panels of this court. Rehearing *en banc* of the stay applications was also denied, no judge having called for a vote on the application for rehearing. Finally Chief Justice Burger denied applications for stay submitted to him as Circuit Justice.

Before us now are the consolidated appeals from the orders entered in the district

16. Each of the nine defendants was found guilty of one count of the indictment. Seven were found guilty under Count XXIII, charging conspiracy to obstruct justice; one was found guilty under Count I, charging conspiracy illegally to obtain government documents; and one was found guilty under Count XVII, charging theft of government property. Although the point is made in text and notes below, text at notes 21-22 and notes 21 & 22, it is worth emphasizing that the documents at issue in this appeal do not include those documents made a part of the stipulated record on which these convictions were based.

17. See *United States v. Hubbard*, 493 F.Supp. 209 at 233 (D.D.C.1979), Hubbard App. at 149 (government represented that returned documents "were deemed unnecessary"). Although the reasons for the documents' return are unclear, they may have been returned pursuant to *Andresen v. Maryland*, 427 U.S. 463, 482 n.11, 96 S.Ct. 2737, 2749 n.11, 49 L.Ed.2d 627 (1964) (approving the return of papers "not within the scope of the warrants or . . . otherwise improperly seized"). *United States v. Hubbard*, *supra*, at 233, Hubbard App. at 149 (noting "this procedure [return] was approved . . . in *Andresen*").

18. The approximately 200 documents included in the stipulated record are apparently among those "unsealed." However, we do not understand the unsealing of these documents to be at issue in these appeals. See note 21, *infra*.

19. Church's Motion to Intervene and to Vacate the Court's Order of October 26, 1979, or in the Alternative to Stay Said Order Pending the Determination of the Appeal Therefrom, *United States v. Hubbard*, Cr.No. 78-401 (D.D.C. filed Oct. 29, 1979) at 1, Church App. Doc. 7 [hereinafter cited as Church's Motion to Intervene].

The transcript of proceedings of October 26, 1979, the day after the unsealing order was entered, reveals that counsel for one of the defendants orally attempted to assert the rights of the Church (which he had represented in some portion of the California 41(e) proceedings) in opposition to the unsealing order, seeking a stay of five to seven days to permit preparation of the appropriate written application. Tr. Oct. 26, 1979 at 43-54, Hubbard App. 211-222. The stay was not granted, the judge apparently reserving decision until a written application was filed. *Id.* at 54, Hubbard App. at 222. The written motion to intervene was not filed until October 29 and the 41(e) application until November 1, several days after the judgments of conviction were entered.

It appears that actual release of the documents was withheld until the order denying defendants' motion for reconsideration was entered (October 30). Reply Brief for Appellants in No. 79-2312 at 19-20.

20. Church's Motion for Return of Property and Church's Application for Temporary Restraining Order, *Church of Scientology of Cal. v. United States*, Civ.No. 79-2975 (D.D.C. filed Nov. 1, 1979), Church App. Doc. 10. The Church sought return of the originals and all copies held by the government or the court with the exception that one copy of any such documents lodged with the Clerk of the Court shall be maintained under seal by the Clerk of the Court for utilization in connection with any appellate proceedings, including petitions for certiorari, by appellants in the criminal case entitled *United States v. Hubbard, et al.* 78-401, and thereafter returned to petitioner.

Church's Motion for Return of Property at 2.

court. We do not understand either the Church or the individual defendants seriously to contest the "unsealing" of documents which are part of the stipulated record or which were used by defendants in the examination of witnesses at the suppression hearing or which were referred to by the trial judge in his opinion on the motion to suppress.²¹ At issue, then, is the substantive and procedural propriety of the judge's orders with respect to the balance of the documents unsealed.²²

II. THE PROCEDURAL RIGHTS OF THE CHURCH AND THE INDIVIDUAL DEFENDANTS

A. Introduction

At the outset we are called upon to determine the appealability of the orders entered in the district court. In our judgment a determination of the orders' appealability turns on a proper understanding of the interests asserted in the district court and on the relationship of these interests to the criminal investigation and prosecution to which they are undeniably connected. We thus turn our attention first to an examination of the nature of the interests asserted in the district court, the procedures attempted to be employed for the assertion of those interests and the procedures which could have been employed, given our assessment of the nature of the interests asserted and their relationship to the criminal case.

21. The individual defendants do not challenge the unsealing order insofar as it relates to the documents made a part of the stipulated record. Public access to that group of documents does not appear to be contested by the Church, either. Argument by the Church in the district court was restricted to documents other than those made a part of the stipulated record, Church's Motion to Intervene at 3-4, Church App. Doc. 7; and although a "claim" concerning these documents is asserted by the Church in its reply brief in this court, Reply Brief for Appellants in Nos. 79-2313 & 79-2324 at 4, we do not think the unsealing of these documents is actually before us.

Concerning the use of documents at the suppression hearing, the Church and the individual defendants each acknowledged at oral argument in this court that their positions would have been much "weaker" or "different" if all the documents had been introduced at the sup-

We then return to the question of the appealability of the orders entered in the district court.

B. Procedural Rights of the Church in the District Court

1. The Nature of the Church's Interests

We think the kinds of interests raised by the Church in its effort to protect the confidentiality of documents seized from its premises are sufficiently strong to mandate the identification of some procedural mechanism by which those interests can be presented contemporaneously to the court that controls public access to the records of which the documents became a part. Our evaluation of the strength of the interests sought to be asserted by the Church derives from an analysis of the Church's asserted property rights in the seized documents and from our recognition of the intrusion by government officials upon the Church's privacy which a compulsory search of Church premises may represent and the compounding of this intrusion that is worked by public access to the contents of the documents seized.

Although we decline the Church's invitation expressly to ground the Church's protectible interests in the Constitution's provisions, we find the kinds of interests asserted to have some constitutional footing, both

pression hearing *in haec verba* or if witnesses had been extensively examined concerning the documents or if the trial judge had engaged in a document-by-document analysis in his consideration of the suppression motion. As a practical matter, we take this acknowledgment to abandon claims to the propriety of unsealing at least that group of documents which were used individually in the examination of witnesses at the suppression hearing or in the trial judge's opinion.

22. References in this opinion to "the documents at issue" are meant to denote only those documents unsealed which were neither made a part of the stipulated record for purposes of trial nor individually used in the examination of witnesses at the hearing on the suppression motion nor specifically referred to in the district court's opinion on the defendant's motion to suppress.

cognate to and rights.²³ This our consideration and the substance of these appeals is essentially to the c

[1] Prior d made clear tha terials are seiz investigation r interest in th Government's r tain evidence f "does not in i retention' afte er, as we have to the integrity ess that propo ing, against w lies, be return owner."²⁵ Lav of itself, may turn,²⁶ but nev tual return. " need for the p both the jurisd the . . . less and indep invalidity of th zure."²⁷

23. Cf. *Afro-A*, F.2d 649, 654

24. *United Stat* (D.C.Cir.1979), U.S. 294, 307 LEd.2d 782 (1

25. *United Stat* (D.C.Cir.1976), *Wright*, 610 F.

26. Property la pending exha prosecutions. F.2d at 1347. on motion be p v. *United Stat* (1924), unless forfeit, in whic at all. *Unitec* 1347.

27. *United Stat* 1104. *Accorc* F.2d at 935; U at 1343, 1347

cognate to and supportive of, constitutional rights.²³ This understanding has framed our consideration of both the procedural and the substantive questions raised in these appeals and has contributed substantially to the conclusions we have reached.

[1] Prior decisions of this court have made clear that the party from whom materials are seized in the course of a criminal investigation retains a protectible property interest in the seized materials. "[T]he Government's right to seize and retain certain evidence for use at trial," we have said, "does not in itself entitle the State to its retention' after trial," ²⁴ Rather, as we have declared, "it is fundamental to the integrity of the criminal justice process that property involved in the proceeding, against which no Government claim lies, be returned promptly to its rightful owner."²⁵ Lawful seizure of the property, of itself, may affect the timing of the return,²⁶ but never the owner's right to eventual return. "[T]he district court, once its need for the property has terminated, has both the jurisdiction and the duty to return the . . . property . . . regardless and independently of the validity or invalidity of the underlying search and seizure."²⁷

23. Cf. *Afro-Am. Publishing Co. v. Jaffe*, 366 F.2d 649, 654 (D.C.Cir.1966) (en banc).

24. *United States v. Farrell*, 606 F.2d 1341, 1347 (D.C.Cir.1979), quoting *Warden v. Hayden*, 387 U.S. 294, 307-308, 87 S.Ct. 1642, 1650, 18 L.Ed.2d 782 (1967).

25. *United States v. Wilson*, 540 F.2d 1100, 1103 (D.C.Cir.1976), quoted in *United States v. Wright*, 610 F.2d 930, 934 (D.C.Cir.1979).

26. Property lawfully seized may be retained pending exhaustion of its utility in criminal prosecutions. See *United States v. Farrell*, 606 F.2d at 1347. Property unlawfully seized must on motion be promptly returned, see, e.g., *Bolt v. United States*, 2 F.2d 922, 923-924 (D.C.Cir. 1924), unless it be contraband or statutorily forfeit, in which event it need not be returned at all. *United States v. Farrell*, 606 F.2d at 1347.

27. *United States v. Wilson*, 540 F.2d at 1103-1104. Accord, *United States v. Wright*, 610 F.2d at 935; *United States v. Farrell*, 606 F.2d at 1343, 1347; *United States v. Palmer*, 565

Both in the district court here and in the Central District of California the Church has asserted entitlement to lawful possession of the documents seized and a corresponding right to their return.²⁸ In the court below this claim was coupled with a request for injunctive relief retaining the documents under seal pending their return. Otherwise, the Church argued, "the ultimate granting of [the] motion [for return of property] will be a meaningless achievement."²⁹ The Church continued, "The publication of the documents invades the right of privacy of the petitioner and its members, violates the petitioner's Fourth Amendment rights, and chills the rights of and free exercise of religion. This damage cannot be undone by the eventual return to petitioner of its property."³⁰

The privacy interests asserted by the Church in its application for injunctive relief pending the documents' return were also asserted in its motion to intervene in the criminal case. In those papers the Church relied not only on the property interests which it retained in the seized documents but on the violation of its right of privacy which release of the seized documents would effect.³¹ Although advertent to the confidential nature of the informa-

F.2d 1063, 1065 (9th Cir. 1977); *United States v. LaFatch*, 565 F.2d 81, 83 (6th Cir. 1977), cert. denied, 435 U.S. 971, 98 S.Ct. 1611, 56 L.Ed.2d 62 (1978). Jurisdiction to return is not dependent upon whether the matter falls within the compass of Fed.R.Crim.P. 41(e). *United States v. Farrell*, 606 F.2d at 1347; *United States v. Wilson*, 540 F.2d at 1104.

28. See Church's Motion for Return of Property, *Church of Scientology of Cal. v. United States*, Civ.No. 79-2975 (D.D.C. filed Nov. 1, 1979) at 2, Church App.Doc. 10.

29. Church's Memorandum in Support of Application for Temporary Restraining Order, *Church of Scientology of Cal. v. United States*, Civ.No. 79-2975 (D.D.C. filed Nov. 1, 1979) at 2, Church App.Doc. 10.

30. *Id.*

31. Church's Motion to Intervene at 1, 4, 5, Church App.Doc. 7.

tion contained in certain of the seized documents, the Church asserted a privacy interest not in particular documents but in the documents as a whole,³² relying, *inter alia*, on the fact that the materials seized were documents, on the circumstances under which they were seized, on the measures theretofore taken by the parties to preserve the documents' confidentiality, and on the fact that the defendants were certain to appeal their criminal convictions on the grounds of the lawfulness of the search and seizure.³³

That the fourth amendment—which is now recognized to protect legitimate expectations of privacy³⁴—can be invoked by corporations to suppress the fruits of a search of corporate premises³⁵ demonstrates an understanding that a compulsory search of even corporate premises may constitute an intrusion upon privacy.³⁶ Furthermore, the Supreme Court has recognized an obligation on the part of the courts to take some measures to protect even a suspected criminal's privacy. The special difficulties of document searches in this connection have been noted. In *Andresen v. Maryland*,³⁷ the Court stated:

32. As noted above, note 21, the Church did not contest the unsealing of the documents made a part of the stipulated record for purposes of trial.

33. Church's Motion to Intervene, Church App. Doc. 7.

34. *Rakas v. Ill.*, 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978). See *Katz v. United States*, 389 U.S. 347, 353, 88 S.Ct. 507, 512, 19 L.Ed.2d 576 (1967); *id.* at 361, 88 S.Ct. at 516 (Harlan, J., concurring).

35. See *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353-54, 97 S.Ct. 619, 628-29, 50 L.Ed.2d 530 (1977) (fourth amendment violated by warrantless search of company offices and seizure of books and records for purpose of facilitating satisfaction of tax liability of company's general manager); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed. 319 (1920) (reversing judgment of contempt against company and individual for refusal to comply with subpoena requiring production of company books and documents whose existence was ascertained through unwarranted search of company office) ("[T]he rights of a corporation against

We recognize that there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable. In searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized. Similar dangers, of course, are present in executing a warrant for the "seizure" of telephone conversations. In both kinds of searches, responsible officials, including judicial officials, must take care to assure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy.

[2] However, the value assigned by our society to protection against governmental invasions of privacy is not measured solely by the fourth amendment's exclusionary rule. The fourteenth amendment's protection against arbitrary or unjustifiable state deprivations of personal liberty also prevents encroachment upon a constitutionally

unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way.").

36. *G.M. Leasing Corp. v. United States*, 429 U.S. at 354, 97 S.Ct. at 629. Cf. *CAB v. United Airlines, Inc.*, 542 F.2d 394, 397 (7th Cir. 1976) (administrative inspection of regulated carriers) (avoiding fourth amendment question by rejecting plenary inspection powers claimed by agency to have been authorized by statute), quoting Statement of Judge Leventhal as to Why He Would Grant Suggestion for Rehearing *En Banc* in *Burlington N., Inc. v. ICC*, 462 F.2d 280, 288 (D.C.Cir.), cert. denied, 409 U.S. 891, 93 S.Ct. 120, 34 L.Ed.2d 148 (1972):

The items involved are internal papers that stand at the heart of management effort, and so long as our carrier operations are rooted in private enterprise there is a strong element of privacy in such items.

37. 427 U.S. 463, 482 n. 11, 96 S.Ct. 2737, 2749, 49 L.Ed.2d 627 (1975). The trial judge relied heavily upon *Andresen* in his decision on defendants' motion to suppress. *United States v. Hubbard*, 493 F.Supp. 209 (D.D.C.1979), Hubbard App. at 104.

recognized spl
The fifth amen
from federal in
be no less com

Minimizing
necessary gov
means of serv
terests, but con
of materials or
trusive means
on at least tw
has recognized
information co

38. *Whalen v. I*
S.Ct. 869, 876
v. Wade, 410
35 L.Ed.2d 147
381 U.S. 479,
(1965) (multip
tectible privac

39. The liberty
amendment ha
ing v. Sharpe.
693, 694, 98 L
of Columbia s
amendment's c

Although
define "liber
term is not
bodily restr
to the full r
vidual is fre
restricted ex
objective.

But see *Maza*
709-715 (D.C.
commissioned
isfactory perfo
erty).

40. The public
formed cor
government.
general pow
nant result
private right
Watkins v. Un
S.Ct. 1173, 11
note omitted),
U.S. 306, 330,
912 (1973) (co
no general au
report concern
vate lives); T
1124 (D.C.Cir.
curate crimina
tional and con
of individual p
late individual
interference w

Cite as 650 F.2d 293 (1980)

recognized sphere of personal privacy.³⁸ The fifth amendment's protection of liberty from federal intrusion upon this sphere can be no less comprehensive.³⁹

Minimizing the initial intrusiveness of necessary governmental activity is one means of serving fundamental privacy interests, but controlling broadside disclosure of materials or information obtained by intrusive means is another.⁴⁰ For example, on at least two recent occasions Congress has recognized that the dissemination of information compounds whatever infringe-

ment of privacy occurs when materials or information are obtained through compulsory means.⁴¹ The need for both kinds of protection has been perceived by state legislatures as well as by the Congress.⁴²

[3] Finally, although the scope of the privacy interests protected by the Constitution differ from the privacy interests protectible under state law,⁴³ the concept of a protectible right of privacy has found widespread acceptance in the state law of this country,⁴⁴ and has been embraced both in the District of Columbia⁴⁵ and in Califor-

38. *Whalen v. Roe*, 429 U.S. 589, 598 n. 23, 97 S.Ct. 869, 876 n.23, 51 L.Ed.2d 64 (1977); *Roe v. Wade*, 410 U.S. 113, 153, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973). Cf. *Griswold v. Conn.*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (multiple constitutional sources of protectible privacy interests).

39. The liberty interests protected by the fifth amendment have been read broadly. See *Bolling v. Sharpe*, 347 U.S. 497, 499-500, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954) (holding District of Columbia school segregation to violate fifth amendment's due process clause):

Although the Court has not assumed to define "liberty" with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective.

But see *Mazaleski v. Treusdell*, 562 F.2d 701, 709-715 (D.C.Cir.1977) (Public Health Service commissioned officer's termination for "unsatisfactory performance" not infringement of liberty).

40. The public is, of course, entitled to be informed concerning the workings of its government. That cannot be inflated into a general power to expose where the predominant result can only be an invasion of the private rights of individuals.

Watkins v. United States, 354 U.S. 178, 200, 77 S.Ct. 1173, 1185, 1 L.Ed.2d 1273 (1957) (footnote omitted), quoted in *Doe v. McMillan*, 412 U.S. 306, 330, 93 S.Ct. 2018, 2033, 36 L.Ed.2d 912 (1973) (concurring opinion) (Congress has no general authority, through publication of report concerning school system, to expose private lives); *Tarlton v. Saxbe*, 507 F.2d 1116, 1124 (D.C.Cir.1974) (FBI duty to maintain accurate criminal records) (recognizing constitutional and common law expressions of "value of individual privacy," which serves to "insulate individuals from unjustifiable government interference with their private lives").

41. Privacy Act of 1974, 5 U.S.C. § 552a(b) (1976) (prohibiting disclosure of personal information without consent except in certain circumstances); Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2511(1)(c) (1976) (prohibiting all disclosure of information obtained by unauthorized wiretap). See *Gelbard v. United States*, 408 U.S. 41, 51-52, 92 S.Ct. 2357, 2362-63, 33 L.Ed.2d 179 (1972) (discussing Title III's prohibitions). See also 5 U.S.C. § 552(b)(6) (1976) (agency need not disclose under Freedom of Information Act, personnel, medical or similar files, whose disclosure would result in "clearly unwarranted invasion of personal privacy").

42. See United States Department of Justice, Compendium of State Laws Governing the Privacy and Security of Criminal Justice Information (1975); Note, *Protecting Privacy From Government Invasion: Legislation at the Federal and State Levels*, 8 Mem.St.L.Rev. 783 (1978).

43. See *Katz v. United States*, 389 U.S. 347, 350-51, 88 S.Ct. 507, 510-511, 19 L.Ed.2d 576 (1967) (comparing fourth amendment and state law protections of privacy); 2 Creighton L.Rev. 354 (1969) (analyzing lower court's decision in *Nader v. Gen. Motors Corp.*, *infra* note 45, in which both federal constitutional and common law privacy interests were asserted).

44. See *Time, Inc. v. Hill*, 385 U.S. 374, 383 n.7, 87 S.Ct. 534, 539, 17 L.Ed.2d 456 (1967) (widespread recognition of right to privacy). It has been suggested that "the right of privacy should have a broader scope in the government disclosure area than in the private tort situation," Emerson, *The Right of Privacy and Freedom of the Press*, 14 Harv.C.R.-C.L.L.Rev. 334, 353 (1979).

45. See, e.g., *Pearson v. Dodd*, 410 F.2d 701, 704 (D.C.Cir.), *cert. denied*, 395 U.S. 947, 89 S.Ct. 2021, 23 L.Ed.2d 465 (1969); *Afro-Am. Publishing Co. v. Jaffe*, 366 F.2d at 653 (en

nia.⁴⁶ Whether and to what extent the privacy interests protected by state law may be asserted by corporate bodies is still unsettled.⁴⁷ However, we think one cannot draw a bright line at the corporate structure. The public attributes of corporations may indeed reduce *pro tanto* the reasonability of their expectation of privacy,⁴⁸ but the nature and purposes of the corporate entity

banc); *Bernstein v. Nat'l Broadcasting Co.*, 129 F.Supp. 817, 831 (D.D.C.1955), *aff'd*, 232 F.2d 369 (D.C.Cir.), *cert. denied*, 352 U.S. 945, 77 S.Ct. 267, 1 L.Ed.2d 239 (1956). See also *Nader v. Gen. Motors Corp.*, 25 N.Y.2d 560, 307 N.Y.S.2d 647, 255 N.E.2d 765 (1970) (applying District of Columbia law).

46. An actionable right of privacy has been recognized by California courts for almost fifty years. See, e.g., *Dietemann v. Time, Inc.*, 449 F.2d 245, 248 (9th Cir. 1971); *Gill v. Curtis Publishing Co.*, 38 Cal.2d 273, 276-78, 239 P.2d 630, 632-33 (1952); *Melvin v. Reid*, 112 Cal. App. 285, 290-293, 297 P. 91, 93-94 (1931). Since 1972 privacy rights have been accorded express constitutional protection in California. In that year the state constitution was amended by referendum and now provides that among the "inalienable rights" enjoyed by the people is the right of "pursuing and obtaining . . . privacy." Cal.Const. art. I, § 1. According to a statement drafted by the amendment's proponents and circulated in a state brochure to prospective referendum voters, three of the principal "mischiefs" at which the amendment was aimed were as follows: "(1) 'government snooping' and the secret gathering of personal information; (2) the overbroad collection and retention of unnecessary personal information by government and business interests; (3) the improper use of information properly obtained for a specific purpose . . ." *White v. Davis*, 13 Cal.3d 757, 775 & n.11, 120 Cal.Rptr. 94, 106 & n.11, 533 P.2d 222, 234 & n. 11 (1975). See *Porten v. Univ. of San Francisco*, 64 Cal.App.3d 825, 829-30, 134 Cal.Rptr. 839, 841-42 (1976); Note, *The California Constitutional Right of Privacy and Exclusion of Evidence in Civil Proceedings*, 6 Pepperdine L.Rev. 231 (1978) (arguing for the creation of an exclusionary rule in civil proceedings to protect the constitutional right of privacy). We have been unable to find a reported California decision where the privacy rights (constitutional or otherwise) of associations or corporations were determined. In *Cobb v. Superior Court*, 99 Cal.App.3d 543, 547 n.3, 160 Cal.Rptr. 561, 564 n.3 (1979), a California appellate court expressly reserved the question as to corporations.

47. The suggestion can usually be traced to *United States v. Morton Salt Co.*, 338 U.S. 632,

and the nature of the interest sought to be protected will determine the question whether under given facts the corporation *per se* has a protectible privacy interest.⁴⁹ Moreover at least certain types of organizations—corporate or non-corporate—should be able to assert in good faith the privacy interests of their members.⁵⁰ Finally, whether acting for itself or on behalf of its

651-52, 70 S.Ct. 357, 368, 94 L.Ed. 401 (1950) whose rationale (see note 48, *infra*) has not been as well remembered as its language. See, e.g., *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 778 n.14, 98 S.Ct. 1407, 1416, 55 L.Ed.2d 707 (1978); *Cal. Bankers Ass'n v. Schultz*, 416 U.S. 21, 65-67, 94 S.Ct. 1494, 1519-20, 39 L.Ed.2d 812 (1974); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 184, 71 S.Ct. 624, 655, 95 L.Ed. 817 (1951) (concurring opinion). See also *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489, 492 (D.C.Cir.1967) (concurring opinion).

48. *United States v. Morton Salt Co.*, 338 U.S. at 651-52, 70 S.Ct. at 368 (relying on public attributes of corporations to explain their lesser interest in privacy).

49. See, e.g., *CAB v. United Airlines*, 542 F.2d at 397-98; *Colegio Puertorriqueño de Niñas, Liceo Ponceño, Inc. v. Pesquera de Busquets*, 464 F.Supp. 761, 765 (D.P.R.1979); *Socialist Workers Party v. Attorney Gen.*, 463 F.Supp. 515, 524-25 (S.D.N.Y.1978) (holding association itself has protectible privacy interests under New York law).

50. See *Cal. Bankers Ass'n v. Schultz*, 416 U.S. at 55, 94 S.Ct. at 1514 (organization may assert constitutional rights of its members); *NAACP v. Button*, 371 U.S. 415, 428, 83 S.Ct. 328, 335, 9 L.Ed.2d 405 (1963) (because association directly engaged in activities claimed to be constitutionally protected, association—though a corporation—may assert on own behalf first amendment associational rights of members and lawyers); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 458-59, 78 S.Ct. 1163, 1169-70, 2 L.Ed.2d 1488 (1958) (association may assert members' right of associational freedom). See generally *Warth v. Seldin*, 422 U.S. 490, 515, 95 S.Ct. 2197, 2213, 45 L.Ed.2d 343 (1975) (association may assert rights of others when seeking declaratory or injunctive relief); *Comm. for Auto Responsibility v. Solomon*, 603 F.2d 992, 998 n.13 (D.C.Cir.1979), *cert. denied*, 445 U.S. 915, 100 S.Ct. 1274, 63 L.Ed.2d 599 (1980) (listing conditions of "associational standing").

members, surely "church" must be entirely from the sorts of "corpo

[4] Because seldom litigated, clear and applicable concepts to be determined by cases. However, combination of pro asserted were rant an opportunity its interests in ingful relief co had⁵³ and with tion a decision resides.⁵⁴

51. Cf. *Kedroff v. U.S.*, 94, 116, 7 (church proposition "radiates religious organization secular control *Watson v. Jones*, L.Ed. 666 (1872) 296, 306, 60 S. ("Even the exercise slight inconvenience protect its citizens supplied).

We agree with "religion" is not Hubbard, 493 401 (D.D.C.19 fact Judge Richardson motion, a fide religious Hubbard App. at 1 for purposes of ally *Founding States*, 409 F. denied, 396 U 427 (1969) (p gious status r where no gov

52. Gavison, P Yale L.J. 421, legal actions part because involves the a Emerson, *The Press*, 14 (1979) ("The r ly accentuates fact, it normal which relief is

members, surely the privacy interests of a "church" must be assessed somewhat differently from the privacy interests of other sorts of "corporations."⁵¹

[4] Because state law privacy rights are seldom litigated,⁵² their contours remain unclear and application of these still-evolving concepts to the claims here stated cannot be determined by reference to already decided cases. However, in our judgment the combination of property and privacy interests asserted were significant enough to warrant an opportunity for the Church to state its interests in the only forum where meaningful relief could expeditiously have been had⁵³ and within whose supervisory discretion a decision to foreclose public access resides.⁵⁴

51. Cf. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116, 73 S.Ct. 143, 97 L.Ed. 120 (1952) (church property dispute) (Court's prior decision "radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation"); *construing Watson v. Jones*, 80 U.S. (13 Wall.) 679, 20 L.Ed. 666 (1872); *Cantwell v. Conn.*, 310 U.S. 296, 306, 60 S.Ct. 900, 904, 84 L.Ed. 1213 (1940) ("Even the exercise of religion may be at some slight inconvenience in order that the state may protect its citizens from injury.") (emphasis supplied).

We agree with Judge Richey that the word "religion" is no talisman, see *United States v. Hubbard*, 493 F.Supp. 209 at 234, Cr.No. 78-401 (D.D.C.1979), *Hubbard App.* at 150, but in fact Judge Richey, for purposes of the suppression motion, assumed the Church was a bona fide religious organization, *id.* at 3, n.2, *Hubbard App.* at 106, and made no contrary finding for purposes of his unsealing order. See generally *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1160-61 (D.C.Cir.), cert. denied, 396 U.S. 963, 90 S.Ct. 434, 24 L.Ed.2d 427 (1969) (*prima facie* case of Church's religious status made out on record of that case, where no government opposition).

52. Gavison, *Privacy and the Limits of Law*, 89 Yale L.J. 421, 457 (1980) ("The relative rarity of legal actions might be explained . . . in part because the initiation of legal action itself involves the additional loss of privacy."). See Emerson, *The Right of Privacy and Freedom of the Press*, 14 Harv.C.R.-C.L.L.Rev. 329, 348 (1979) ("The mere institution of litigation greatly accentuates the original loss of privacy; in fact, it normally multiplies the very effect from which relief is sought.").

2. Procedural Mechanisms for the Church's Assertion of Interest

a. Ancillary Jurisdiction

[5] Our decisions make plain that a federal trial court has ancillary jurisdiction to hear and determine claims closely related to and arising out of the criminal proceedings brought before it.⁵⁵ We think this concept of ancillary jurisdiction is flexible enough to accommodate claims relating to seized property, even when made by strangers to the criminal case.⁵⁶ We thus conclude that the trial court had jurisdiction to hear the claims made. However, this conclusion does not imply the proper method by which the claim should be presented, and to that question we turn below.

53. By drawing upon decisions considering the right to return of seized property we do not mean to imply that the Church's procedural rights were dependent upon an immediate right to return of the documents at issue. See note 63, *infra*. We suggest only that a proprietary interest in a document, in combination with the privacy interests implicated by the facts and circumstances of the seizure, may give rise to a protectible interest in preventing indiscriminate public access to the records of which the document has become a part.

54. See text at notes 78-89, *infra*.

55. *United States v. Wilson*, 540 F.2d at 1103 (return of property); *Morrow v. Dist. of Columbia*, 417 F.2d 728, 740 (D.C.Cir.1969) (dissemination of information pertaining to accused's arrest).

56. See *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 356, 51 S.Ct. 153, 157, 75 L.Ed. 374 (1931); *Cogen v. United States*, 278 U.S. 221, 225, 49 S.Ct. 118, 119, 73 L.Ed. 275 (1929); *United States v. LaFatch*, 565 F.2d at 82-83. Although this circuit's cases on return of property, see notes 24-27, *supra*, have all involved motions by defendants in the criminal proceedings rather than motions by third parties, none has turned on that circumstance, nor have we given it analytical significance. Ancillary jurisdiction enables "a common sense solution" of the problems courts . . . face in attempting to 'do complete justice in the premises,'" *Morrow v. Dist. of Columbia*, 417 F.2d at 738, quoting 1 W. Barron & A. Holtzoff, *Federal Practice and Procedure* § 23 at 94 (Wright ed. 1960).

b. Analysis of the Procedures Employed and Available

The means by which third parties have sought to assert their interests in criminal

57. *Cent. S.C. Chapter v. Martin*, 556 F.2d 706 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022, 98 S.Ct. 749, 54 L.Ed.2d 771 (1978) and *Cent. S.C. Chapter v. United States Dist. Court*, 551 F.2d 559 (4th Cir. 1977) strikingly illustrate the procedural confusion that erupts when third parties claim some interest in the conduct of criminal proceedings. Those cases concerned a trial judge's restrictive order affecting the activities of the press during a criminal trial. The press' appeal from this order was dismissed because filed by a non-party. *Id.* at 563. Even treating the papers on appeal as a petition for writ of mandamus, the court concluded that relief was inappropriate under the accepted standards for issuance of the extraordinary writ, stating that it did not through this treatment reach the merits of the restrictive order. *Id.* at 562. Finally, treating the press' district court motion for stay as having commenced an independent action and the appeal as having been taken from denial of the stay, the appeal was dismissed because in that court's view a summary proceeding commenced by motion was inappropriate to the determination of the press' claims. *Id.* at 565. The court suggested that an independent action commenced by complaint might be an appropriate vehicle for the assertion of the kinds of interests raised by the press. When an independent action for declaratory and injunctive relief was filed and dismissed, however, the appellate court stated its belief that "mandamus is the proper remedy to request the relief prayed for," 556 F.2d at 707, treated the appeal on the merits as a petition for mandamus relief and modified the trial court's restrictive order. *Id.* at 708. Decisions in two other circuits have also identified mandamus as the appropriate vehicle for the assertion of third party interests in criminal proceedings. *United States v. Sherman*, 581 F.2d 1358, 1360-61 (9th Cir. 1978); *CBS, Inc. v. Young*, 522 F.2d 234, 237 (6th Cir. 1975). See also *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 294 (2d Cir. 1979).

A different conclusion was reached in the fifth circuit, however. In *United States v. Gurney*, 558 F.2d 1202 (5th Cir. 1977), *cert. denied*, 435 U.S. 968, 98 S.Ct. 1606, 56 L.Ed.2d 59 (1978), members of the press sought access to "documents and exhibits, some of which were in evidence [at the criminal trial] and some of which were only identified." *Id.* at 1205. When the clerk "refused access to many of these items pursuant to oral directions of the district judge," *id.*, the press filed with the district judge a "Petition for Hearing and for Vacation of Restrictions on Press and Other News Media." *Id.* The trial judge considered the argument of the press and entered an order

cases have been manifold.⁵⁷ Indeed, the Church here chose to employ three of the mechanisms which have been used, with varying success, by other parties in other

permitting inspection of those exhibits received in evidence, *id.*, which was subsequently entertained by the circuit court on appeal, *id.* at 1206-07, a petition for writs of mandamus and prohibition having earlier been denied. *Id.* at 1206 n.4. *Gurney* is consistent with an approach applied in an earlier decision in that circuit, *United States v. Briggs*, 514 F.2d 794 (5th Cir. 1975). In that case the fifth circuit reviewed on appeal the denial of a pre-trial petition, submitted to the trial judge by unindicted co-conspirators, to expunge references to them from the indictment. The simple motion route has also been approved by the third circuit sitting en banc. *United States v. Schiavo*, 504 F.2d 1, 5 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 1096, 95 S.Ct. 690, 42 L.Ed.2d 688 (1974). In that case non-party newspapers had moved the trial judge to vacate a gag order he had entered in a criminal case; the trial judge's decision on that motion was reviewed on appeal. A proceeding by motion to the court of trial has occasionally even been denominated "intervention" without disapproval of the invocation of this concept in a criminal proceeding. See *United States v. RMI Co.*, 599 F.2d 1183, 1186 (3d Cir. 1979) and cases discussed *infra* note 67.

A case arising in our own circuit illustrates a third approach to the assertion of non-party interests in criminal proceedings. In *United States v. Mitchell*, 386 F.Supp. 639, 640 (D.D.C. 1975) and 397 F.Supp. 186 (D.D.C. 1975) members of the media seeking access to the "White House tapes" introduced in evidence and played at trial in the "Watergate case," brought a "motion" under Rule 47, Fed.R.Crim.P. *Id.*, 386 F.Supp. at 640. Upon ruling that the media lacked standing to make a motion in the criminal case, Judge Sirica directed that the motion be treated as a miscellaneous civil proceeding. See *United States v. Mitchell*, 551 F.2d at 1256. Orders entered in that proceeding were appealed to this court where the appeal was entertained on the merits. *Id.* The Supreme Court granted certiorari and reviewing the merits of this court's decision, reversed. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570. See also cases cited *infra* note 67.

The means by which third parties have sought to assert their interests in state criminal proceedings have been equally various. Compare, e.g., *Richmond Newspapers, Inc. v. Va.*, 448 U.S. 555, 558-563, 100 S.Ct. 2814, 2818-21, 65 L.Ed.2d 973 (1980) with *State v. Simants*, 194 Neb. 783, 236 N.W.2d 794 (1975), *rev'd*, *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976). See also *Gannett Co. v. DePasquale*, 43 N.Y.2d 370, 401 N.Y.S.2d 756, 372 N.E.2d 544 (1977), *aff'd*, 443

cases.⁵⁸ It fir
criminal case,
return of pro
plication for a
ing public acc
Finally, it pet
mandamus dir
alia, "to refr
inspection"⁵⁹

Of these m
employed was r

U.S. 368, 99
and cases cit
Rendleman, i
Silence Order

58. See note 5

Apart from
the Church it
Church mem
action for in
Civ.No. 79-3
alleging that
fiably discus
unsealed, th
ments invad
their rights
exercise of re
surrounding
violated thei
District of C
cused themse
judge of this
designation.

By memor
June 12, 198
dismissed for
1980), the co
was in essenc
at 2, which c
mand an orde
tion. *Id.* In
that they we
suggested th
appeals migh
noted that t
criminal case
this court in
this action ar
tional illustr
surrounding
ests in crimi
the availabili
of appeals o
60-62 and n
note 121, *inf*

59. Church's
re Church of
(D.C.Cir. file

60. We have
which is seiz

Cite as 650 F.2d 293 (1980)

cases.⁵⁸ It first sought to intervene in the criminal case, it then brought a motion for return of property, accompanied by an application for an order temporarily restraining public access to the documents at issue. Finally, it petitioned this court for a writ of mandamus directing the district court, *inter alia*, "to refrain from unsealing for public inspection" ⁵⁹ the documents at issue.

Of these methods we think the last employed was neither appropriate nor ade-

U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979) and cases cited *infra*, note 67. See generally Rendleman, *Free Press-Fair Trial: Review of Silence Orders*, 52 N.C.L.Rev. 127 (1973).

58. See note 57, *supra*.

Apart from the various methods employed by the Church itself, individual former and present Church members also brought a separate class action for injunctive relief, *Doe v. Richey*, Civ.No. 79-3274 (D.D.C. filed Dec. 5, 1979), alleging that members of the class were identifiably discussed in certain of the documents unsealed, that public access to these documents invades their privacy, infringes upon their rights of associational freedom and free exercise of religion, and that the circumstances surrounding the issuance of the unsealing order violated their due process rights. When all District of Columbia district court judges recused themselves, the action was assigned to a judge of this court, sitting as a district judge by designation.

By memorandum opinion and order issued June 12, 1980, the complaint in that case was dismissed for lack of jurisdiction, *id.* (June 12, 1980), the court reasoning that the relief sought was in essence a writ of mandamus, *id.*, slip op. at 2, which could not be employed to countermand an order of a court of coordinate jurisdiction. *Id.* In answer to the plaintiffs' argument that they were left without a remedy, the court suggested that mandamus relief in the court of appeals might be available, slip op. at 3-4, and noted that the propriety of intervention in a criminal case was still under consideration by this court in this case. Slip op. at 5. We think this action and its disposition serve as an additional illustration of the procedural confusion surrounding the assertion of third party interests in criminal proceedings. With respect to the availability of mandamus relief in the court of appeals our discussion *infra*, text at notes 60-62 and notes 60-62 is pertinent. *But see* note 121, *infra*.

59. Church's Petition for Writ of Mandamus, *In re Church of Scientology of Cal.*, No. 79-2318 (D.C.Cir. filed Nov. 9, 1979) at 2.

60. We have observed that while "[p]roperty which is seized in a criminal proceeding either

quote to the task. It is the trial court and not this court that should engage in the initial consideration of the interests at stake, especially where, as here, the matter is urgent and largely dependent on an extensive record with which the trial judge is intimately familiar.⁶⁰ Even assuming mandamus relief is available to non-parties in a criminal proceeding,⁶¹ we think the inevitable delay in seeking a writ and the narrow circumstances under which it will be granted⁶² render it inadequate to redress the

by search warrant or subpoena may be ultimately disposed of by the court in that proceeding or in a subsequent civil action[.] [i]t makes for an economy of judicial effort to have the matter disposed of in the criminal proceeding by the judge that tried the case." *United States v. Wilson*, 540 F.2d at 1104. As this court noted in its general discussion of ancillary jurisdiction in criminal cases, "disputes related to a single dispute should be resolved in the original forum." *Morrow v. Dist. of Columbia*, 417 F.2d at 740.

61. The ninth, fourth and sixth circuits have recently entertained on the merits petitions for mandamus relief brought by members of the press whose access was barred to various aspects of criminal proceedings to which they were not parties. *United States v. Sherman*, 581 F.2d at 1360-61; *Cent. S.C. Chapter v. Martin*, 556 F.2d at 707; *CBS, Inc. v. Young*, 522 F.2d at 237. See also *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d at 294. See generally *Ex parte Uppercu*, 239 U.S. 435, 36 S.Ct. 140, 60 L.Ed. 368 (1915) (cited in *Martindell*) (employing mandamus to permit individual not criminally charged to obtain sealed records of a criminal trial for use as evidence in civil proceeding). The special urgency with which the courts address restraints on the press, see *In re Halkin*, 598 F.2d 176, 199 (D.C.Cir.1979), may explain why in each of these cases the merits of the non-party's mandamus petition were fully considered and no attention was given to devising a means by which the interests at stake might first have been addressed to the district court judge.

62. The availability of the extraordinary writ of mandamus is traditionally extremely limited. *Kerr v. United States Dist. Court*, 426 U.S. 394, 402, 96 S.Ct. 2119, 2123, 48 L.Ed.2d 725 (1976); *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383, 74 S.Ct. 145, 148, 98 L.Ed. 106 (1953).

Although the Supreme Court in *Schlagenhauf v. Holder*, 379 U.S. 104, 109-12, 85 S.Ct. 234, 237-39, 13 L.Ed.2d 152 (1964) and *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 257-60, 77 S.Ct. 309, 314-15, 1 L.Ed.2d 290 (1957) and this

type of injury here alleged and mandate the identification of some other means by which a non-party's interest may timely be presented to the district court whose actions are alleged to affect that interest.

Of the two other methods by which the Church attempted to assert its interests, we think the motion for return of property and the accompanying application for temporary injunctive relief most closely approximated a proper means by which the trial court's ancillary jurisdiction could have been invoked by the Church to present its claims to retain the documents under seal.⁶³

court in *Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 524 (D.C.Cir.1975) have expressed a willingness to employ the writ in an advisory capacity to answer important questions of first impression and in a supervisory capacity to remedy certain classes of error not traditionally thought remediable by mandamus, this willingness cannot be read expansively. See *Will v. United States*, 389 U.S. 90, 99-107, 88 S.Ct. 269, 275-80, 19 L.Ed.2d 305 (1967); *Nat'l Right to Work Legal Defense v. Richey*, 510 F.2d 1239, 1242 (D.C.Cir.), cert. denied, 422 U.S. 1008, 95 S.Ct. 2631, 45 L.Ed.2d 671 (1975). But see *In re Halkin*, 598 F.2d at 199-200. To come to another conclusion would risk dilution of the extraordinary nature of the writ of mandamus and alteration of the proper functioning of trial and appellate jurisdiction. This is not to suggest that mandamus should not be available or continue to be available in extraordinary circumstances: to cure abuses of discretion; to answer novel and important questions of law; or, of course, to prevent the thwarting of appellate review. See *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26, 63 S.Ct. 938, 941, 87 L.Ed. 1185 (1943). But see *Helstoski v. Meador*, 442 U.S. 500, 505, 99 S.Ct. 2445, 2448, 61 L.Ed.2d 30 (1979) (mandamus unavailable when alternative remedies exist); *Will v. United States*, 389 U.S. 90, 88 S.Ct. 269, 19 L.Ed.2d 305 (narrow availability of mandamus in criminal proceedings).

Nevertheless, because of the writ's extraordinary nature, this court's earlier denial, without statement of reasons, of the Church's petition for mandamus, *In re Church of Scientology of Cal.*, No. 79-2318 (D.C.Cir. Nov. 21, 1979), has no bearing on our decision of these appeals. See *Hospes v. Burmite Div. of the Whittaker Corp.*, 420 F.Supp. 806, 809-10 (S.D.Miss. 1976). See also *Hoffman v. Blaski*, 363 U.S. 335, 340 n.9, 80 S.Ct. 1084, 1088, 4 L.Ed.2d 1254 (1960).

63. The motion for return of property was dismissed

In our view the Church could have proceeded by simple motion, served on the parties in the criminal case, under the caption of that case.⁶⁴ We think such a motion would have served the Church's interests adequately and we treat the Church's efforts in the district court as having commenced such a proceeding.⁶⁵

It has long been recognized that a summary proceeding initiated simply by motion to the court of trial is ordinarily suitable for the purpose of asserting an interest in the ultimate disposition of property seized in a criminal proceeding.⁶⁶ We now hold that it

as against the Clerk of the United States District Court for the District of Columbia on the ground that Rules 3 and 8(a) [Fed.R. Civ.P.] have not been complied with; and, furthermore, because there is no viable claim set forth in any of the papers, nor can the Court conceive that there could be, against the Clerk of this Court.

Transcript of Proceedings, *Church of Scientology v. United States*, Civ. No. 79-2975, Nov. 2, 1979 at 56, Church App. Doc. 11. We do not understand the Church to appeal the district court's dismissal of the clerk as a party to its motion, but insofar as the Church contests that portion of the district court's order that may be read to deny on the merits immediate return of the seized documents, we affirm, because the evidentiary utility of the seized documents has not yet been exhausted. *United States v. Wilson*, 540 F.2d at 1103-04. First, at least copies of the documents may be needed for review of the defendants' criminal conviction. Second, the charges pending against the two other individuals remain to be prosecuted. We do not suggest that the government may, by selective prosecution or otherwise, prolong in bad faith its retention of seized material, but this case does not hint of such purpose.

64. See *Cogen v. United States*, 278 U.S. at 225, 49 S.Ct. at 119. Despite its criminal caption this motion, and the proceeding commenced by it, are civil in nature.

65. Given this treatment, a statement now of the precise procedural mechanism the Church could have employed as an original matter is not strictly necessary. However, we offer our views for the guidance of the parties and the district court in future cases presenting similar facts. But see note 121, *infra*.

66. See *Go-Bart Importing Co. v. United States*, 282 U.S. at 355, 51 S.Ct. at 157 (approving summary procedure for determination of claim to seized papers); *Cogen v. United States*, 278 U.S. at 225, 49 S.Ct. at 119 (same); *Bolt v. United States*, 2 F.2d at 923-24 (reversing deni-

is also appropriate presumptive ownership of documents so seized.

The availability of summary proceeding in the Church's efforts

of motion for return of property (seized); *United States v. Wilson*, 540 F.2d at 1103 (same) (summary proceeding not addressed).

"Summary" proceeding is a summary proceeding conducted by the court. Black's Law Dictionary (1979). See *N. v. United States*, 404, 406-07, 826 (1960). For a summary hearing under a procedure court's ancillary jurisdiction, see *United States v. Wilson*, 540 F.2d at 1103-04. Some circumstances may justify a summary hearing or delay of trial that the court with disapproval. *United States v. Wilson*, 540 F.2d at 1103-04. (1) denial of preliminary hearing. *Cobbledick v. United States*, 402 U.S. 26, 60 S.Ct. 54 (1965). (2) quash grand jury indictment. *United States v. Wilson*, 540 F.2d at 120-21 (appellate review of post-indictment).

Although as a matter of course within the trial court's jurisdiction may be the one conducting the kind of procedure that these interests are. *Scanlon*, 362 U.S. 17 (1960). It is true that co-ownership of property is a plenary proceeding such a proceeding action or where the court of trial court discipline. *United States v. Wilson*, 540 F.2d at 157; *Ganne*, 381, 401 N. 550, *aff'd*, 443 U.S. 100 (1979). L.Ed.2d 608. Of course afford the media an opportunity in the context of a fu-

Cite as 650 F.2d 293 (1980)

is also appropriate for the purpose of the presumptive owner's assertion of interest in maintaining the confidentiality of documents so seized.

The availability of this ancillary, summary proceeding and our treatment of the Church's efforts as having commenced such

a proceeding make it unnecessary either to decide the procedural propriety of the methods in fact employed by the Church in its efforts in the district court to retain the documents under seal, or to address the question whether one may ever intervene in a criminal case.⁶⁷ Furthermore, because we

al of motion for return of property illegally seized); *United States v. Wilson*, 540 F.2d at 1103 (same) (summary nature of proceeding not addressed).

"Summary" proceedings by definition are those conducted "in a prompt and simple manner." Black's Law Dictionary 1084 (5th ed. 1979). See *N. H. Fire Ins. Co. v. Scanlon*, 362 U.S. 404, 406-07, 80 S.Ct. 843, 845, 4 L.Ed.2d 826 (1960). For two reasons a full-scale evidentiary hearing might not in fact be permitted under a proceeding within the criminal trial court's ancillary jurisdiction. First, this court has concluded that a criminal trial court's ancillary jurisdiction is limited to circumstances where the claim is determinable without a substantial new fact-finding. *Morrow v. Dist. of Columbia*, 514 F.2d at 740. Second, under some circumstances the holding of an evidentiary hearing may threaten the kind of disruption of or delay in the progress of the criminal trial that the courts have consistently viewed with disapprobation. E. g., *DiBella v. United States*, 369 U.S. 121, 129, 82 S.Ct. 654, 659, 7 L.Ed.2d 614 (1962) (appeal unavailable from denial of pre-indictment motion to suppress); *Cobbledick v. United States*, 309 U.S. 323, 325-26, 60 S.Ct. 540, 541-42, 84 L.Ed. 783 (1940) (appeal unavailable from denial of motion to quash grand jury subpoena *duces tecum*); *Cogen v. United States*, 278 U.S. at 228, 49 S.Ct. at 120-21 (appeal unavailable from denial of post-indictment motion to suppress).

Although as a practical matter a proceeding within the trial court's ancillary jurisdiction may be the only truly effective means of protecting the kinds of interests here asserted, we think procedural due process does not require that these interests be explored in a full-scale evidentiary hearing. See *N. H. Fire Ins. Co. v. Scanlon*, 362 U.S. at 409-10, 80 S.Ct. at 847 ("It is true that courts have sometimes passed on ownership of property in their custody without a plenary proceeding, where, for illustration, such a proceeding was ancillary to a pending action or where property was held in the custody of court officers, subject to court orders and court discipline."), citing *Go-Bart Importing Co. v. United States*, 282 U.S. at 355, 51 S.Ct. at 157; *Gannett Co. v. DePasquale*, 43 N.Y.2d at 381, 401 N.Y.S.2d at 762-63, 372 N.E.2d at 550, *aff'd*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (dictum) ("[C]ourts should of course afford interested members of the news media an opportunity to be heard, not in the context of a full evidentiary hearing, but in a

preliminary proceeding adequate to determine the magnitude of any genuine public interest [in access to a suppression hearing].") See generally *Parham v. J. L.*, 442 U.S. 584, 608 n.16, 99 S.Ct. 2493, 2507 n.16, 61 L.Ed.2d 101 (1979) (emphasizing flexibility of due process) ("[T]here is no requirement as to exactly what procedures to employ whenever a traditional judicial type hearing is mandated . . ."); *Cafeteria & Restaurant Workers Local 473 v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961) (similar); *Friendly*, "Some Kind of Hearing," 123 U.Pa.L.Rev. 1267, 1282-87 (1975). But see *United States v. Eisner*, 533 F.2d 987, 994 (6th Cir.), *cert. denied*, 429 U.S. 919, 97 S.Ct. 314, 50 L.Ed.2d 286 (1976) (dictum) (better to hold evidentiary hearing before entering exclusionary order in criminal case); *United States ex rel. Lloyd v. Vincent*, 520 F.2d 1272, 1275 (2d Cir.), *cert. denied*, 423 U.S. 937, 96 S.Ct. 296, 46 L.Ed.2d 269 (1975) (dictum) (same); Note, *All Courts Shall Be Open: The Public's Right to View Judicial Proceedings and Records*, 52 Temp. L.Q. 311, 332 (1979) (arguing for brief evidentiary hearing before exclusionary order is entered in criminal case, recognizing expense and delay to be caused).

67. Federal courts have frequently permitted third parties to assert their interests in preventing disclosure of material sought in criminal proceedings or in preventing further access to materials already so disclosed. See, e. g., *United States v. Nixon*, 418 U.S. 683, 692, 94 S.Ct. 3090, 3099, 41 L.Ed.2d 1039 (1974) (President, a nondefendant, may appeal denial of motion to quash post-indictment subpoena *duces tecum* directed to him, compelling production of records of certain presidential meetings); *Gravel v. United States*, 408 U.S. 606, 608 n.1, 92 S.Ct. 2614, 2619, n.1, 33 L.Ed.2d 583 (1972) (noting that district court had permitted Senator to intervene in proceeding on legislative assistant's motion to quash grand jury subpoena and that circuit court had permitted Senator to appeal from denial of motion to quash); *Perlman v. United States*, 247 U.S. 7, 12, 38 S.Ct. 417, 419, 62 L.Ed. 950 (1918) (owner may intervene to assert property and constitutional interests in preventing release to government, for purposes of grand jury investigation, of exhibits introduced and impounded in civil case); *In re Grand Jury Applicants*, 619 F.2d 1022 (3d Cir. 1980) (employer may appeal denial of motion brought as intervenor to quash grand jury sub-

think the Church was in fact heard on the merits in its efforts to retain the seized documents under seal,⁶⁸ and because the district court's rationale for denying relief,

poenas *ad testificandum* served on employees); *United States v. RMI Co.*, 599 F.2d at 1186-87 (corporation may appeal denial of motion for protective order brought as *de facto* intervenor to prevent pre-trial disclosure to defendants of corporate books and records previously disclosed by subpoena to grand jury which indicted defendants). See also *In re 1975-2 Grand Jury Investigation*, 566 F.2d 1293, 1294-95, 1296 & n.6, 1301 (5th Cir.), *cert. denied*, 437 U.S. 905, 98 S.Ct. 3092, 57 L.Ed.2d 1135 (1978) (dismissing as nonappealable district court's order permitting party with no apparent ownership interest in documents to intervene in proceedings begun with purpose to disclose to another district court documents used in terminated grand jury investigation); *Ill. v. Sarbaugh*, 552 F.2d 768, 772-73 (7th Cir.), *cert. denied*, 434 U.S. 889, 98 S.Ct. 262, 54 L.Ed.2d 174 (1977) (permitting defendants in terminated criminal proceeding to intervene in motion brought by state for disclosure to it of grand jury transcripts). These assertions of interest have sometimes been denominated "intervention," *Perlman v. United States*, *supra*; *Ill. v. Sarbaugh*, *supra*; see *In re Grand Jury Applicants*, *supra*, *United States v. RMI Co.*, *supra*, and the intervention criteria of the Federal Rules of Civil Procedure have occasionally been applied. *Ill. v. Sarbaugh*, *supra*. See *In re 1975-2 Grand Jury Investigation*, *supra*.

Both the language and rationale of *United States v. RMI Co.*, *supra*, suggests that under the circumstances of this case the Church should be permitted to intervene to assert its interests in denying public access to the documents at issue. In that case the third circuit concluded:

[I]t is settled law that persons affected by the disclosure of allegedly privileged materials may intervene in pending criminal proceedings and seek protective orders, and if protection is denied, seek immediate appellate review.

Id., 599 F.2d at 1186. That civil intervention rights were historically absolute for those who had an interest in the property held in the custody or subject to the control or disposition of the court, 3B Moore Federal Practice ¶ 24.09[1] (1980), is also suggestive of this conclusion. However, whether, when and for what purposes intervention *eo nomine* is or should be permitted in criminal proceedings is still a matter of some doubt. *Cent. S. C. Chapter v. United States Dist. Court*, 551 F.2d at 563-65 (dismissing appeal of order restricting activities of press during conduct of criminal trial) ("nothing in the criminal law or rules permit[s] press to intervene"). See *Gannett Pac. Corp. v. Richardson*, 59 Haw. 224, 235, 580 P.2d 49, 57-58 (1978) (press may not intervene to pro-

insofar as it can be ascertained on this record, turned at least in part on the merits of the interests asserted,⁶⁹ we treat the orders appealed by the Church as having

test closure of portion of preliminary hearing in criminal case); *State v. Simants*, 194 Neb. at 788, 236 N.W.2d at 798, *rev'd on other grounds sub nom.*, *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (error to have permitted press to intervene to protest pre-trial gag order); *State v. Ervin*, 38 N.C. App. 261, 248 S.E.2d 91 (1978) (no error to have permitted post-trial intervention by non-party asserting interest in seized property); *State v. Bianchi*, 92 Wash.2d 91, 593 P.2d 1330 (1979) (error to have permitted non-party to intervene to protest gag order).

68. The Church's position on the merits of the unsealing order was argued to the trial judge in open court immediately after the decision was announced, Tr. Oct. 26, 1979 at 43-45, Hubbard App. at 211-13, and again in its motion to intervene, *supra*, note 19 (which was filed while Judge Richey informally stayed his unsealing order), and finally in its motion for return of property, *supra*, note 20, and in oral argument on that motion. Transcript of Proceedings, *Church of Scientology of Cal. v. United States*, Civ.No. 79-2975, Nov. 2, 1979 at 4-19, 29-42.

69. The Church's motion to intervene was denied without a statement of reasons. *United States v. Hubbard*, Cr. No. 78-401 (D.D.C. Nov. 1, 1979), Church App. Doc. 9. Denial of the Church's application for an order temporarily restraining public access pending return of the documents was accompanied by the following rationale:

[This] issue has been examined repeatedly by this court. It was the subject of an extensive opinion, carefully worded, carefully thought out, by this court in its order and memorandum of October 30, 1979.

The very essence of the order of this court of October 30th held that a party does not have the right to hide material seized during a search on the ground that a search may be declared invalid on appeal.

Since May 19, 1971, this court has kept statistics, and it has had the unfortunate duty to sentence more people convicted of crimes than any other judge of this court.

And this case, namely, the case of the *United States versus Hubbard*, is the only case where documents in a suppression hearing, or otherwise, involving criminal charges have not been spread upon the public record.

The public does have a right to know; and to hold otherwise would be to make a folly of the first amendment with respect to the right of the public to know, which this court has written on at length on several occasions.

reached the m
remainder of tr
peals according

C. Procedure Defendant

[6] The ind
on different gr
access to the s
one minor exce
Church's, fell v
lary jurisdic
interpret that
the claims, the
criminal proce
them; their de
the district cou
decide questio
with the propr
tion. This cor
ment of the se
proceeding of
face; but it a
judgment on th
asserted can ar
pendently of th
press the fruit
premises.

The one clai
vorded from th

sought here i
was denied b
afternoon.

It is essen
tion for anot
30th order.

And the co
that what it
petitioner, ev
sought by ot
reverse itself
which it car
indicated, an

The court
likelihood of
the public int
ing to make t
ested parties
in accordance
been followin
Transcript of P
gy of Cal. v. I
Nov. 2, 1979 a

Cite as 650 F.2d 293 (1980)

reached the merits and will consider the remainder of the issues raised by those appeals accordingly.

C. *Procedural Rights of the Individual Defendants*

[6] The individual defendants, though on different grounds, also protested public access to the seized documents and, with one minor exception, their claims, like the Church's, fell within the trial court's ancillary jurisdiction in criminal cases, as we interpret that concept.⁷⁰ This is because the claims, though closely related to the criminal proceedings, were separable from them; their determination did not require the district court and will not require us to decide questions inextricably intertwined with the propriety of the criminal conviction. This conclusion reflects our assessment of the separability from the criminal proceeding of the claims raised on their face; but it also inevitably reflects our judgment on the merits that the interests asserted can and should be evaluated independently of the defendants' motion to suppress the fruits of the search of Church premises.

The one claim made that cannot be divorced from the criminal proceedings them-

selves was that release of the documents violated the negotiated plea disposition.⁷¹ We do not consider this claim to fall within the trial court's ancillary criminal jurisdiction. Accordingly, we do not address it, but leave it for consideration on appeal from the criminal conviction if the defendants wish to raise it at that time.

A brief summary of the remaining interests asserted by the individual defendants will demonstrate their ancillary nature. The defendants argued: that publication would vitiate the benefits of possible reversal of their convictions on appeal; would interfere with the proceedings commenced and orders entered in the federal courts in California; would prejudice fair trial rights in other criminal proceedings; and would violate the privacy rights of individuals mentioned or discussed in the seized documents.⁷² None of these claims is inextricably bound up in an assessment of the validity of the judgment of conviction. Even the "fair trial" rights assertedly jeopardized by public access to the documents at issue presented an ancillary question. This is because the defendants did not seek to protect from unfair publicity the proceedings then in being but rather any subsequent proceedings in which they or other indicted individuals might be defendants.

70. See notes 55-56, *supra*, and accompanying text.

71. *Cf. Cogen v. United States*, 278 U.S. at 227-28, 49 S.Ct. at 120-21 (denial of defendant's pre-trial motion for suppression and return of seized property not "final").

72. Supplemental Memorandum in Support of Defendants' Motion for Reconsideration Re the Sealing of Documents, *United States v. Hubbard*, Cr.No. 78-401 (D.D.C. filed Oct. 29, 1979) (submitted by defendants Heldt and Snider); Motion for Reconsideration of Part of the Court's Order of October 25, 1979, *United States v. Hubbard*, Cr.No. 78-401 (D.D.C. filed Oct. 26, 1979) (submitted by all defendants). The last of these claims (privacy of individuals) appears to have been made only by defendants Heldt and Snider. Defendants' Supplemental Memorandum, *supra* at 2.

The court finds that the relief sought here is no more than that relief which was denied by the court of appeals yesterday afternoon.

It is essentially a recasting of an application for another stay of this court's October 30th order.

And the court agrees with the government that what it really seeks here, namely, the petitioner, even though the other relief was sought by other parties, is to have this court reverse itself in its October 30, 1979 order, which it carefully considered, as previously indicated, and did not do.

The court further finds that there is no likelihood of success on the merits, and that the public interest will be served by continuing to make the documents available to interested parties after examination by the court in accordance with the procedures that it has been following, and will continue to follow.

Transcript of Proceedings, *Church of Scientology of Cal. v. United States*, Civ.No. 79-2975, Nov. 2, 1979 at 54-56, Church App. Doc. 11.

D. Appealability

[7] The "ancillary" nature of the interests asserted by both the Church and the individual defendants and the practical finality of the contested orders determines the question of their appealability.⁷³ The analogy to the appealable "collateral order" doctrine of *Cohen v. Beneficial Industrial Loan Corp.*⁷⁴ is strong and persuasive. Like the orders which are the subject of that doctrine the orders entered here are "separable from, and collateral to"⁷⁵ the rights of the parties to the criminal proceedings. Furthermore, because public access to the documents at issue will to some extent irreparably damage the interests asserted, an

73. See *Go-Bart Importing Co. v. United States*, 282 U.S. at 356, 51 S.Ct. at 157. The government challenges the appealability of the order denying the motion labeled by the Church as one for a temporary restraining order. Refusal of an order truly of that character is a ruling neither final under 28 U.S.C. § 1291 (1976) nor appealable though interlocutory under 28 U.S.C. § 1292(a)(1) (1976). *Hoh v. Pepsico, Inc.*, 491 F.2d 556, 560 (2d Cir. 1974). See also *Adams v. Vance*, 570 F.2d 950, 953 (D.C.Cir. 1977) (grant of temporary restraining order not ordinarily appealable). The denial is, however, appealable when it is equatable to denial of a preliminary injunction. *Levesque v. Me.*, 587 F.2d 78, 79-80 (1st Cir. 1978). That treatment is proper here because the denial came only after the Church was heard on the merits. *Sampson v. Murray*, 415 U.S. 61, 86-88, 94 S.Ct. 937, 951-52, 39 L.Ed.2d 166 (1974). Moreover, the Supreme Court "has adopted essentially practical tests for identifying those judgments which are, and those which are not, to be considered 'final.'" *Brown Shoe Co. v. United States*, 370 U.S. 294, 306, 82 S.Ct. 1502, 1513, 8 L.Ed.2d 510 (1962) (citing cases), and an order may be deemed final and hence appealable when to do otherwise would effectively destroy the opportunity for meaningful review. *N. D. State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 162, 94 S.Ct. 407, 412, 38 L.Ed.2d 379 (1973). See also *Berrigan v. Sigler*, 475 F.2d 918, 919 (D.C.Cir.1973), citing *McSurley v. McClellan*, 426 F.2d 664, 668 (D.C.Cir.1970). Here there is serious threat of irreparable harm to the property and the privacy interests advanced.

74. 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528 (1949). On several occasions the collateral order doctrine has been applied by the Court to determine the reviewability of issues raised in criminal cases. See *United States v. MacDonald*, 435 U.S. 850, 853-61, 98 S.Ct. 1547, 1549-53, 56 L.Ed.2d 18 (1978) (hold-

order which has the effect of permitting such an invasion, as a practical matter, "finally determine[s]" the claim.⁷⁶ Our consideration of the issues raised will neither halt nor disturb the orderly progress of the criminal proceeding.⁷⁷ We are thus satisfied that these issues are properly before us and turn to consideration of the merits of the district court's decision to unseal the documents at issue.

III. THE MERITS OF THE UNSEALING ORDER

We begin by recognizing this country's common law tradition of public access to records of a judicial proceeding.⁷⁸ Access to

ing unreviewable denial of defendant's motion to dismiss indictment on speedy trial grounds); *Abney v. United States*, 431 U.S. 651, 657-60, 97 S.Ct. 2034, 2039-40, 52 L.Ed.2d 651 (1977) (holding reviewable denial of defendant's motion to dismiss indictment on double jeopardy grounds). See also *Helstoski v. Meanor*, 442 U.S. at 506-08, 99 S.Ct. at 2448-49 (appeal was available for denial of defendant's motion to dismiss indictment on speech or debate clause grounds); *Stack v. Boyle*, 342 U.S. 1, 6, 72 S.Ct. 1, 4, 96 L.Ed. 3 (1951) (appeal was available for denial of defendant's motion to reduce bail). Significantly, the doctrine was applied by this court in *In re Grand Jury Investigation of Ocean Transp.*, 604 F.2d 672, 673-74 (D.C.Cir., cert. denied, 444 U.S. 915, 100 S.Ct. 229, 62 L.Ed.2d 169 (1979) (per curiam) to hold reviewable the district court's denial of a motion to return allegedly privileged documents inadvertently disclosed to the Department of Justice in the course of responding to a grand jury subpoena *duces tecum*. See also *United States v. Cianfrani*, 573 F.2d 835, 845 (3d Cir. 1978) (closure of pretrial hearing); *United States v. Schiavo*, 504 F.2d at 4-5 (gag order).

75. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. at 546, 69 S.Ct. at 1225.

76. *Id.* See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468-69, 98 S.Ct. 2454, 2457-58, 57 L.Ed.2d 351 (1978); *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 171-72, 94 S.Ct. 2140, 2149-50, 40 L.Ed.2d 732 (1974).

77. *Cobbledick v. United States*, 309 U.S. at 327, 60 S.Ct. at 542. See *United States v. MacDonald*, 435 U.S. at 853-54, 98 S.Ct. at 1549-50.

78. *Nixon v. Warner Communications, Inc.*, 435 U.S. at 597, 98 S.Ct. at 1311 [hereinafter cited as *Nixon*].

records serves ensuring the in ings in particul ment process m Supreme Court Communication cess is not with tions:

Every court its own reco been denied become a ve For example inspection ha a court to in "used to gra

It is clear recognize a g public recor cial records the English Cumming, 1 (K.B.1829), not condition proprietary a need for it (footnotes omi 551 F.2d at 12 ell], rev'd on 435 U.S. 589, Cf. *Richmond* 555, 100 S.Ct

79. See *Nixon*, 1312:

The intere suance of a found, for e keep a watc lic agencies, intention to the operatio (citations omit

This comm relic of ancie the right is state. As Ja lar Governm or the near logue to a b both. . . their own G with the p Like the Fir inspection s and enlighte public trial ment, the ri any attempt ments of per for truth; ar judicial rem

Cite as 650 F.2d 293 (1980)

records serves the important functions of ensuring the integrity of judicial proceedings in particular and of the law enforcement process more generally.⁷⁹ But as the Supreme Court noted in *Nixon v. Warner Communications, Inc.*,⁸⁰ the tradition of access is not without its time-honored exceptions:

Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not "used to gratify private spite or promote

public scandal" through the publication of "the painful and sometimes disgusting details of a divorce case." Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption, or as sources of business information that might harm a litigant's competitive standing.

(citations omitted). The public has in the past been excluded, temporarily or permanently, from court proceedings or the records of court proceedings to protect private as well as public interests: to protect trade secrets,⁸¹ or the privacy and reputation of victims of crimes,⁸² as well as to guard

It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents. In contrast to the English practice, see, e. g., *Browne v. Cumming*, 10 B. & C. 70, 109 Eng.Rep. 377 (K.B.1829), American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit.

(footnotes omitted); *United States v. Mitchell*, 551 F.2d at 1257-59 [hereinafter cited as *Mitchell*], *rev'd on other grounds sub nom. Nixon*, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570. Cf. *Richmond Newspapers, Inc. v. Va.*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980).

79. See *Nixon*, 435 U.S. at 597-98, 98 S.Ct. at 1312:

The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies, and in a newspaper publisher's intention to publish information concerning the operation of government.

(citations omitted); *Mitchell*, 551 F.2d at 1258:

This common law right is not some arcane relic of ancient English law. To the contrary, the right is fundamental to a democratic state. As James Madison warned, "A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy: or perhaps both. . . . A people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Like the First Amendment, then, the right of inspection serves to produce "an informed and enlightened public opinion." Like the public trial guarantee of the Sixth Amendment, the right serves to "safeguard against any attempt to employ our courts as instruments of persecution," to promote the search for truth, and to assure "confidence in . . . judicial remedies."

(footnotes omitted). Cf. *Richmond Newspapers, Inc. v. Va.*, 448 U.S. at 569-571, 100 S.Ct. at 2823-24 (multiple purposes of public access to conduct of criminal trial); *Id.* at 592-598, 100 S.Ct. at 2836-2839 (Brennan, J., concurring) (same); *In re Oliver*, 333 U.S. 257, 270, 68 S.Ct. 499, 506, 92 L.Ed. 682 (1948) (public criminal trial is "restraint on possible abuse of judicial power"); *United States v. Cianfrani*, 573 F.2d at 851-54 (public right of access to criminal trials to see that justice is done); *United States v. Lopez*, 328 F.Supp. 1077, 1087 (E.D.N.Y.1971) (same).

80. 435 U.S. at 598, 98 S.Ct. at 1312.

81. See *Stamicarbon, N.V. v. Am. Cyanamid Co.*, 506 F.2d 532, 539-40 (2d Cir. 1974) (access to criminal contempt trial may be restricted, over corporate defendant's objections, during portion of trial when another's trade secrets are disclosed); Note, *All Courts Shall Be Open: The Public's Right to View Judicial Proceedings and Records*, 52 Temp.L.Q. at 335 & n.214, citing, *inter alia*, *State ex rel. Ampco Metal, Inc. v. O'Neill*, 273 Wis. 530, 539-40, 78 N.W.2d 921, 927 (1956) (inherent power to hold proceedings *in camera* when trade secrets might be revealed); Annot. 62 ALR 2d 509, 510-29 (1958). See also *Richmond Newspapers, Inc. v. Va.*, 448 U.S. at 600 n.5, 100 S.Ct. at 2821 (Stewart, J. concurring).

82. E. g., *United States ex rel. Latimore v. Sie-laff*, 561 F.2d 691, 693 (7th Cir. 1977), *cert. denied*, 434 U.S. 1076, 98 S.Ct. 1266, 55 L.Ed.2d 782 (1978) (excluding the merely curious from the testimony of a rape victim); *Harris v. Stephens*, 361 F.2d 888, 891 (8th Cir. 1966), *cert. denied*, 386 U.S. 964, 87 S.Ct. 1040, 18 L.Ed.2d 113 (1967) ("frequent and accepted practice" to close courtroom to spectators during testimony of rape victim); *Sawyer v. Duffy*, 60 F.Supp. 852, 853 (N.D.Cal.1945). See also *Richmond*

against risks to national security interests,⁸³ and to minimize the danger of an unfair trial by adverse publicity.⁸⁴ In addition, both Congress and the courts have recognized that for certain purposes records of arrests and even of convictions may be expunged by action of the court.⁸⁵

The Supreme Court has recently identified a first amendment right of access in the public to the conduct of a criminal trial, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980), but whether this right extends to the conduct of a pretrial suppression hearing,⁸⁶ and, if so, what factors may be found weighty enough to permit complete or partial closure of such proceedings,⁸⁷ is not clear. In any event, we deal here not with

Newspapers, Inc. v. Va., 448 U.S. at 600 n.5, 100 S.Ct. at 2821 (Stewart, J. concurring). But see *Lexington Herald Leader Co. v. Tackett*, Nos. 80-SC-215-MR & 80-SC-287-MR, slip op. at 2, 4 (Ky. June 24, 1980) (although defendant did not object, closure of courtroom during testimony of ten children alleged to have been victims of sodomy was error).

83. See, e.g., *United States v. Wash. Post*, 403 U.S. 943, 91 S.Ct. 2271, 29 L.Ed.2d 853 (1971) (court permitting filing under seal of materials claimed to affect national security); *N.Y. Times v. United States*, 403 U.S. 942, 91 S.Ct. 2270, 29 L.Ed.2d 853 (1971) (same). See also *Richmond Newspapers, Inc. v. Va.*, 448 U.S. at 598 n.24, 100 S.Ct. at 2839 (Brennan, J. concurring), citing *United States v. Nixon*, 418 U.S. at 714-16, 94 S.Ct. at 3110-11; *United States v. Lemonakis*, 485 F.2d 941, 962-63 (D.C.Cir.1973), cert. denied, 415 U.S. 989, 94 S.Ct. 1586, 39 L.Ed.2d 885 (1974).

84. See *Branzburg v. Hayes*, 408 U.S. 665, 684-85, 92 S.Ct. 2646, 2658, 33 L.Ed.2d 626 (1972); *United States v. Gurney*, 558 F.2d at 1209-10. See also *Gannett Co. v. DePasquale*, 443 U.S. at 378-79, 99 S.Ct. at 2904-2905. In addition, affidavits submitted in support of search warrants are sometimes sealed to protect the secrecy of an ongoing criminal investigation. See *In re Sealed Affidavits*, 600 F.2d 1256 (9th Cir. 1979); *Shea v. Gabriel*, 520 F.2d 879, 880, 882 (1st Cir. 1975).

85. See, e.g., *Doe v. Webster*, 606 F.2d 1226, 1233 (D.C.Cir.1979) (Federal Youth Corrections Act permits expungement of "conviction records"); *Tarlton v. Saxbe*, 507 F.2d 1116 (apparently addressing only records maintained by law enforcement agencies). *Stephens v. Van Arsdale*, 221 Kan. 676, 608 P.2d 972 (1980) (statutory denial of access to criminal court

the closure of courtroom proceedings but with the sealing of documents whose contents were not specifically referred to or examined upon during the course of those proceedings and whose only relevance to the proceedings derived from the defendants' contention that many of them were not relevant to the proceedings, i. e., that the seizure exceeded the scope of the warrant.

The Court's decision in *Richmond Newspapers* has not cast doubt on its earlier conclusion that "the right to inspect and copy judicial records is not absolute;"⁸⁸ nor do we read it to have undermined its conclusion, based on then available law, that "the decision as to access [to judicial records] is one best left to the sound discretion

records not unconstitutional where convictions are ordered "expunged"). But see *Johnson v. State*, 336 So.2d 93 (Fla.1976) (expungement statute invalid insofar as it required judiciary to destroy court records).

86. Compare *Gannett Co. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979), distinguished in Chief Justice Burger's opinion in *Richmond Newspapers* as having considered only the question of closure of pretrial hearings, *Richmond Newspapers*, 448 U.S. at 561-564, 100 S.Ct. at 2820-21. See also the concurring opinion of Mr. Justice Stewart, *id.*, slip op. at 1.

87. *Richmond Newspapers* itself did not forbid all closure of criminal trial proceedings. As the Chief Justice noted, "We have no occasion here to define the circumstances in which all or parts of a criminal trial may be closed to the public." *Id.* at 581 n.18, 100 S.Ct. at 2830 n.18. See also *id.* at 584, 100 S.Ct. at 2831. (Stevens, J. concurring) (emphasizing "total absence of any record justification for th[is] closure order"); *id.* at 598 n.24, 100 S.Ct. at 2839 n.24 (Brennan, J. concurring) (right to gather information must "be assayed by considering the information sought and the opposing interests invaded" and noting that "national security concerns . . . may sometimes warrant closures"); *id.*, at 600 n.5, 100 S.Ct. at 2840 (Stewart, J. concurring) (suggesting justifiability of partial civil trial closure to preserve trade secrets and of partial criminal trial closure—if sixth amendment rights were not impaired—during portions of rape testimony).

88. *Nixon*, 435 U.S. at 598, 98 S.Ct. at 1312; See *Richmond Newspapers*, 448 U.S. at 581 n.18, 100 S.Ct. at 2836.

of the trial o
cised in ligh
circumstances
the analysis
under the fa
case we thi
flawed and v
plemental pro

A. The "Agains

Some aspe
access and o
denying publi
out examin
ments at issu
opinion these
terests involv
as the "gener

We acknow
tion in favor
criminal cour
that on the r
ment of the
stake does no
documents at
under seal.

We cannot
judge's order
initial decisio
a weighing
appropriate.
remand. F
weighed only
think the un
of discretion.
this case is a
factors discu
ings below.

89. *Nixon*, 435 U.S. at 598, 98 S.Ct. at 1312; See *Richmond Newspapers*, 448 U.S. at 581 n.18, 100 S.Ct. at 2836.

90. *Richmond Newspapers*, 448 U.S. at 581 n.18, 100 S.Ct. at 2836.

91. *Gannett Co. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979).

of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.”⁸⁹ In the analysis that follows we explain why under the facts and circumstances of this case we think the unsealing order was flawed and why we must remand for supplemental proceedings.

A. *The “Generalized Interests” for and Against Public Access in This Case*

Some aspects of the public’s interest in access and of the appellants’ interests in denying public access can be weighed without examining the contents of the documents at issue. In the remainder of this opinion these aspects of the competing interests involved in this case are referred to as the “generalized interests” at stake.

We acknowledge an important presumption in favor of public access to all facets of criminal court proceedings but we conclude that on the record now before us an assessment of the generalized interests here at stake does not support a conclusion that the documents at issue should not be retained under seal.

We cannot determine from the trial judge’s orders what factors entered into his initial decision to unseal or even if he found a weighing of these generalized interests appropriate. For this reason alone we must remand. However, taken as having weighed *only* the generalized interests, we think the unsealing decision was an abuse of discretion. Compelling this conclusion in this case is an analysis of several relevant factors discussed under separate subheadings below.

89. *Nixon*, 435 U.S. at 599, 98 S.Ct. at 1312. This discretion should, of course, clearly be informed by this country’s strong tradition of access to judicial proceedings—a tradition which is now grounded, at least with respect to the actual conduct of criminal trials, in the first amendment.

90. *Richmond Newspapers, Inc. v. Va.*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973.

91. *Gannett Co. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979).

1. The Need for Public Access to the Documents at Issue

Under this heading we bring together several considerations which in our judgment bear upon the precise weight to be assigned in this case to the always strong presumption in favor of public access to judicial proceedings. Some of these considerations have already been mentioned and others, because they also bear on the reasons why public access might be denied, will be emphasized again later.

We first note that this case does not involve access to the courtroom conduct of a criminal trial, recently found by the Supreme Court to be constitutionally protected.⁹⁰ Nor does it involve access to the courtroom conduct of a pre-trial suppression motion, access the Court a year earlier ruled the sixth amendment alone did not protect.⁹¹ It does not involve access to documents which have been introduced as evidence of guilt or innocence in a trial,⁹² nor even documents whose contents have been discussed or—insofar as we can determine—relied upon by the trial judge in his decision on the defendants’ motion to suppress. As we emphasize below,⁹³ it concerns only access to documents introduced by the defendants solely to show the overbreadth of a search whose lawfulness, although decided by the trial judge in the government’s favor, was certain to be appealed at the time the unsealing order was entered.⁹⁴

The public in this case had access, *inter alia*, to the courtroom proceedings on the motion to suppress, to the memoranda filed by the parties in connection with that motion, to the trial judge’s memorandum deci-

92. *Compare Nixon*, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 *rev’g sub nom. Mitchell*, 551 F.2d 1252 (tape recordings).

93. See text at notes 108–111, *infra*.

94. We note that in the original Rule 41(e) proceedings brought by the Church in California the California federal courts took the precaution of prohibiting all public disclosure while the issue was pending within the ninth circuit. See note 6, *supra*.

sion on the suppression motion, to the trial judge's memorandum decision on the negotiated disposition, to the stipulated record which was the basis for the defendants' convictions and to the actual "trial" of the criminal charges of which the defendants were convicted. None of the documents at issue here was either used in the examination of witnesses during the protracted public hearing on the suppression motion or specifically referred to in the trial judge's public decision on the motion to suppress or included as part of the publicly available stipulated record on which the defendants' criminal convictions were had.⁹⁵

Under all these circumstances we conclude that the purposes of public access are only modestly served by the trial judge's unsealing decision.

2. Public Use of the Documents

Although the materials at issue are part of the "record" of the proceedings, their

95. See note 96, *infra*.

96. We have described in text and notes above the tortuous proceedings by which the seized documents were made a part of the record in the criminal proceedings and came to reside in the custody of the district court here. Although the defendants urged the court to examine the documents, none of those at issue was read into the record *in haec verba* nor was any used in the examination of witnesses by either the government or the defense. The defense prepared, introduced and examined a witness concerning a study which purported to classify all documents seized as within or without the scope of the warrant. A computerized catalogue of seized materials, which was the basis for the study, was also made a part of the record but neither the study nor the catalogue revealed or even described the contents of the documents. The documents made a part of the stipulated record for trial and the documents used in the examination of witnesses at the suppression hearing are not among those at issue on this appeal. See note 21, *supra*. In addition, the content of those at issue was not described either generally or specifically in the trial judge's decision on the motion to suppress, nor so far as we can tell were they described in any papers filed in the district court proceedings. The seized documents were under the seal of this district court from the moment they were made a part of the record until the court acted upon the unsealing orders here at issue and no member of the public, by attending courtroom proceedings or by reading

contents were not publicly revealed until the court entered its unsealing order.⁹⁶ Previous access is a factor which may weigh in favor of subsequent access. Determining whether, when and under what conditions the public has already had access to court records in a given case cannot of course guide decision concerning whether, when and under what conditions the public *should* have access as an original matter. However, previous access has been considered relevant to a determination whether more liberal access should be granted to materials formerly properly accessible on a limited basis through legitimate public channels⁹⁷ and to a determination whether further dissemination of already accessible materials can be restrained.⁹⁸

The record in this case reveals no such access to the documents until the district court decided that there was "a right in the public to know."⁹⁹ There is thus no previ-

the decisions of the district judge or the motions or other papers filed by the parties, could have determined their contents. As a practical matter these documents had not already entered the public domain through the criminal court proceedings. Furthermore, nothing before us now suggests that their confidentiality had been impaired by use in the federal courts in California. See note 6, *supra*.

97. Those portions of the "White House tapes" to which the media sought access in *Mitchell*, 551 F.2d 1252, *rev'd sub nom. Nixon*, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 had already been publicly played to the limited number of spectators who were able to find space in Judge Sirica's "cramped courtroom." See *Nixon*, 435 U.S. at 593 n.3, 594, 98 S.Ct. at 1309 n.3, 1310; *Mitchell*, 551 F.2d at 1258.

98. See *Okl. Publishing Co. v. Dist. Court*, 430 U.S. 308, 310-11, 97 S.Ct. 1045, 1046-47, 51 L.Ed.2d 355 (1977) (press may not be restrained from publishing photograph and information obtained in and around courtroom proceedings when they were not in fact excluded from courtroom); *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975) (press may not be made liable for publishing name of rape victim whose name was already publicly available).

99. Acknowledging the relevance of previous access raises the question whether on remand the fact of access while this appeal was pend-

ous access to granted through ing order.

3. Fact of Those O

Strong objection sealing order b ants and, to th the Church. T tant considera and privacy Church to req ments under s to assert them strength with terests is a s importance of

ing should ent public access think it shoul used in the te: were "formerl mit this mode quent evaluati only compoun court's origina

Because we as a continuu with each pass ing encroachm become moot. U.S. 649, 659 L.Ed.2d 410 (ment privacy delivered to a delivery to FB cannot automa *Nixon*, 435 U. (but for Presic prepared to ba ings already p terest in acces *Inst. of Healt. 1978*) (Privacy disclosure of ment by pres. rights of the p copies of the court while ac We treat th should be gr which have al through other the "particula note 112 and

100. The gove the individual. cence to the t served the po

Cite as 650 F.2d 293 (1980)

ous access to weigh in favor of the access granted through the district court's unsealing order.

3. Fact of Objection and Identity of Those Objecting to Disclosure

Strong objections were raised to the unsealing order both by the individual defendants and, to the extent it was permitted, by the Church. This is an obvious but important consideration. The kinds of property and privacy interests asserted by the Church to require retention of the documents under seal can be waived by failure to assert them in timely fashion,¹⁰⁰ and the strength with which a party asserts its interests is a significant indication of the importance of those rights to that party.

ing should enter into a determination whether public access should now be permitted. We think it should not. To employ the language used in the text, we do not think the materials were "formerly properly accessible." To permit this mode of access to factor into a subsequent evaluation of the interests at stake would only compound the errors we perceive in the court's original orders.

Because we conceive of the interests asserted as a continuum which can be further invaded with each passing day by a single and unchanging encroachment, we do not think the case has become moot. *Cf. Walter v. United States*, 447 U.S. 649, 659 n.13, 100 S.Ct. 2395, 2403, 65 L.Ed.2d 410 (1980) (continuing fourth amendment privacy interest in package mistakenly delivered to and opened by third party before delivery to FBI) ("A partial invasion of privacy cannot automatically justify a total invasion."); *Nixon*, 435 U.S. at 602-03, 98 S.Ct. at 1314-15 (but for Presidential Recordings Act Court was prepared to balance privacy interests in recordings already publicly played against public interest in access). See *Cell Assoc., Inc. v. Nat'l Inst. of Health*, 579 F.2d 1155, 1157 (9th Cir. 1978) (Privacy Act claim not mooted by public disclosure of materials and widespread comment by press). We do not now address the rights of the press or the public to make use of copies of the documents obtained through the court while access was permitted.

We treat the question whether public access should be granted to particular documents which have already entered the public domain through other channels under our discussion of the "particularized interests" at stake, *infra*, note 112 and accompanying text.

100. The government appears to suggest that the individual defendants' reluctant acquiescence to the trial court's warnings that he reserved the power and discretion to unseal the

An important element in this case is the fact that the party from whom the documents were seized was not made a defendant in the proceedings and now objects to public access to the fruits of the seizure. We think that where a third party's property and privacy rights are at issue the need for minimizing intrusion is especially great and the public interest in access to materials which have never been judicially determined to be relevant to the crimes charged is especially small.¹⁰¹

We are well aware that all defendants here were officials or employees of the Church and that the defendants' interests and the Church's interests are integrally related; nonetheless it is also true that their interests are not identical. The de-

documents whenever he wished constitutes a waiver of objection to disclosure. Brief for Appellee in No. 79-2312 at 10; Brief for Appellee in Nos. 79-2313 & 79-2324 at 10-11. We disagree. Although we think the defendants' position could have been more forcefully stated and more assiduously pursued, we do not think their acquiescence constitutes a waiver of their underlying substantive objection. See Tr. Jul. 18, 1979 quoted *supra*, note 9. Even if we were to hold that the Church had notice of the trial judge's position through the defendants or through common counsel, the uncertainty of its procedural right to assert an interest in retaining the documents under seal, as well as the uncertainty of eventual unsealing would foreclose a finding of waiver by the Church based on notice of the trial judge's repeated warnings.

101. See generally *Andresen v. Maryland*, 427 U.S. at 482 n.11, 96 S.Ct. at 2749 quoted in part, *supra*, text following note 37. But see *Zurcher v. Stanford Daily*, 436 U.S. 547, 562 n.9, 98 S.Ct. 1970, 1980 n.9, 56 L.Ed.2d 525 (1978) (rejecting rule requiring government to proceed by subpoena for materials held by third party not suspected of crime): "We reject totally the reasoning of the District Court that additional protections are required to assure that the Fourth Amendment rights of third parties are not violated because of the unavailability of the exclusionary rule as a deterrent to improper searches of premises in the control of nonsuspects." We, of course, have no occasion to pass upon the lawfulness of the underlying search in this case. The minimization of intrusion which we address is that which may be effected by careful exercise of the trial court's supervisory authority over public access to the fruits of a search and seizure held in that court's custody.

defendants might not be permitted¹⁰² and are certainly not required to raise the Church's interests in preventing public access to the documents at issue. Even in the context of this case, then, we think the fact that objection to access is made by a third party weighs in favor of non-disclosure.

4. Strength of the Generalized Property and Privacy Interests Asserted

That the documents were seized from non-public areas of Church premises is undisputed. Accordingly, the Church's "standing" to assert the kinds of generalized interests which derived from the fact of seizure from its premises—interests which we have discussed above in connection with the Church's procedural rights¹⁰³—is unquestionably strong.¹⁰⁴ By this we mean its interest on this record is direct and substantial, substantial enough, given the other factors to be considered in weighing the generalized interests in public access against the generalized interest in nondis-

102. *E. g.*, *County of Kern v. Superior Court*, 82 Cal.App.3d 396, 401, 147 Cal.Rptr. 248, 251 (1978) (in resisting discovery of records hospital may not assert California constitutional privacy right of doctors); *Hendrickson v. Cal. Newspapers, Inc.*, 48 Cal.App.3d 59, 62, 121 Cal.Rptr. 429, 431 (1975) (deceased's relatives may not assert California constitutional privacy right in publication of deceased's criminal conviction). *Cf. United States v. Salvucci*, 448 U.S. 83, 86, 100 S.Ct. 2547, 2550, 65 L.Ed.2d 619 (1980) (in seeking suppression of fruits of search, defendant may not assert another's expectations of privacy); *United States v. Payner*, 447 U.S. 727, 729, 100 S.Ct. 2439, 2443, 65 L.Ed.2d 468 (1980) (same); *Rakas v. Ill.*, 439 U.S. 128, 138–40, 99 S.Ct. 421, 427–28, 58 L.Ed.2d 387 (1978) (same). *But see Griswold v. Conn.*, 381 U.S. at 481, 85 S.Ct. at 1679 (physician and directors of planned parenthood league may assert constitutional rights of married persons with whom they had professional relationship); *Comm'r v. Mun. Court*, 100 Cal. App.3d 69, 161 Cal.Rptr. 19 (1979) (in resisting discovery of names of arrested persons Highway Patrol may assert California constitutional privacy right of arrestees).

103. See text at notes 23–53, *supra*.

104. The documents are of course presumed to be the property of the Church, from whom they were seized, and if the government contends otherwise, it carries the burden of proof. See

closure here asserted, to require retention of the documents under seal.

The "standing" of the individual defendants to assert these generalized interests in the documents at issue is less clear. Because the Church's asserted interests are strong and the defendants assert no conflicting interest, we need not determine the precise scope of the individuals' generalized interests in the retention of the documents under seal. We note, however, that the defendants' standing to assert certain of these generalized property and privacy interests may be broader than the scope of their "standing" to object to an unlawful search and seizure.¹⁰⁵

5. Possibility of Prejudice

Two defendants whose extradition has only recently been accomplished remain to be tried. In addition, the government has the right to try the nine convicted defendants on any of the remaining counts should their single-count convictions be overturned on appeal. Thus, the possibility of

United States v. Wright, 610 F.2d at 939 ("seizure of property from someone is *prima facie* evidence of that person's entitlement") (emphasis in original); *United States v. Palmer*, 565 F.2d at 1065 ("We conclude that in absence of any cognizable claim of ownership or right to possession adverse to that of appellant, the district court should have granted appellant's motion and returned to him the money taken from him by government seizure.").

The privacy interests asserted, though perhaps not presumptively protectible, are equally strong on this record. In fourth amendment terms, the reasonability of the Church's expectation of privacy in the areas searched is unquestionable on this record. See *G.M. Leasing Corp. v. United States*, 429 U.S. at 354, 97 S.Ct. at 629; *Coolidge v. N. H.*, 403 U.S. 443, 474–75, 91 S.Ct. 2022, 2042–43, 29 L.Ed.2d 564 (1971). See also *Payton v. N. Y.*, 445 U.S. 573, 584–593, 100 S.Ct. 1371, 1379–83, 63 L.Ed.2d 639 (1980). *But cf. Pearson v. Dodd*, 410 F.2d at 704–06 (no actionable claim for invasion of privacy stated by United States Senator against newspaper columnists who publicized information derived from copies of documents taken from Senator's office without Senator's knowledge or authorization by Senator's staff members and former staff members).

105. See note 102, *supra*. See also note 50, *supra*.

prejudice to the disclosure is a favor of denying. The likelihood of depend on a num most importantly als disclosed. Un undertaken, the not be determin conclusion that the remote¹⁰⁷—ostens plete familiarity not, therefore, fa

6. The Purpose of the Documents Were

The single most conclusion that t been struck in th documents at iss defendants for t strating the unl seizure. What: the exclusionar thrust of the fo tom the protecti interests.¹⁰⁸ Pu the prospect o third-party inte deed if one who

106. See text at

107. The defend would jeopardiz by the district c

The govern criminal pros ments seized ing. Moreov who will have if they are e The defendan documents w fair trials. V other jurisdic merely hypot information t forthcoming, can be dealt court or this sealed on su would ever b other two d most of the a result from tl lated record issue on the

prejudice to the defendants by sensational disclosure is a factor which may weigh in favor of denying immediate public access.¹⁰⁶ The likelihood of prejudice will in turn depend on a number of factors, including, most importantly, the nature of the materials disclosed. Until such an examination is undertaken, the weight of this factor cannot be determined. The trial judge's conclusion that the possibility of prejudice is remote¹⁰⁷—ostensibly reached without complete familiarity with the documents—cannot, therefore, favor public access.

6. The Purposes for Which the Documents Were Introduced

The single most important element in our conclusion that the proper balance has not been struck in this case is the fact that the documents at issue were introduced by the defendants for the sole purpose of demonstrating the unlawfulness of the search and seizure. Whatever the purposes served by the exclusionary rule, the fundamental thrust of the fourth amendment is at bottom the protection of privacy and property interests.¹⁰⁸ Putting aside for the moment the prospect of untoward invasions of third-party interests, it would be ironic indeed if one who contests the lawfulness of a

search and seizure were always required to acquiesce in a substantial invasion of those interests simply to vindicate them.¹⁰⁹

It must be remembered that the documents here were not determined by the trial judge to be relevant to the crimes charged; they were not used in the subsequent "trial"; nor were they described or even expressly relied upon by the trial judge in his decision on the suppression motion. Their *only* use by the parties and the *only* purpose for which they were admitted in the criminal proceedings was to assist the court in its determination of whether the search and seizure were unlawfully overbroad. If such a connection with the proceedings were enough by itself to justify public access, there would be very little left of fourth amendment and common law rights to privacy. For, by the act of attempting to show the excesses of the search by the extent of the documents seized—documents which may not be relevant to criminal charges or necessary to trial—defendants in criminal proceedings and nondefendant owners in Rule 41(e) proceedings will invite public dissemination of the contents of the documents and thereby impair the very privacy rights they seek to vindicate, regardless of the use ultimately made of the documents by the court.

106. See text at note 84 and note 84, *supra*.

107. The defendants' argument that disclosure would jeopardize fair trial rights was rejected by the district court in the following analysis:

The government has indicated that other criminal prosecutions based on the documents seized in California may be forthcoming. Moreover, there are two defendants who will have to stand trial before this Court if they are extradited from Great Britain. The defendants contend that release of the documents will taint their ability to receive fair trials. With respect to prosecutions in other jurisdictions, the defendants concern is merely hypothetical. The Court has no hard information that other prosecutions will be forthcoming, but even if this happens that can be dealt with at a later day by another court or this one. If court records were kept sealed on such "potential" grounds, none would ever be released. With respect to the other two defendants awaiting extradition, most of the alleged "taint" against them may result from the records attached to the stipulated record and these records are not at issue on the instant motion. Furthermore,

with respect to all other criminal proceedings, if any, a careful voir dire can be used to eliminate any prejudice. *United States v. Haldeman*, 559 F.2d 31 (D.C.Cir.1976) (*per curiam*) (*en banc cert. denied*, 431 U.S. 933 [97 S.Ct. 2641, 53 L.Ed.2d 250] (1977)). *United States v. Hubbard*, Cr. No. 78-401, slip op. at 4-5 (D.D.C. Oct. 30, 1979), Hubbard App. at 226-27.

108. See, e.g., *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416, 86 S.Ct. 459, 465, 15 L.Ed.2d 453 (1966) (fourth and fifth amendments are concerned with "constitutional values . . . reflecting the concern of our society for the right of each individual to be left alone"); *Mapp v. Ohio*, 367 U.S. 643, 656-57, 81 S.Ct. 1684, 1692, 6 L.Ed.2d 1081 (1961). See also *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting).

109. Cf. *Simmons v. United States*, 390 U.S. 377, 389-94, 88 S.Ct. 967, 973-76, 19 L.Ed.2d 1247 (1968).

The risk is especially grave in document searches not only because the protected position occupied by personal papers has traditionally been closely guarded¹¹⁰ but because determination of a claim of overbreadth may require the court to examine the documents' contents. However, in this case it is not clear that such an examination was undertaken in the course of ruling on the suppression motion; the unsealing decision is thus especially difficult to reconcile with the purposes underlying the documents' inclusion in the record of the suppression proceedings.

Finally, one factor not crucial to our decision is nevertheless worth emphasizing: that is, that the lawfulness of the search and seizure was certain to be appealed at the time the trial judge entered his unsealing order.¹¹¹ That appeal has been filed and is still pending in this court. Until the appellate route has been exhausted, the lawfulness of the search and seizure has not been finally determined. The possibility of reversal on appeal contributes to the irony inherent in the decision to unseal the documents at issue.

[8] Given all the factors discussed above we conclude that on the present state of the record the seal on the documents at issue

110. See generally McKenna, *The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment*, 43 Ind.L.J. 55 (1977); Note, *Papers, Privacy and the Fourth and Fifth Amendments: A Constitutional Analysis*, 69 Nw.U.L.Rev. 626 (1974).

111. See note 15, *supra*.

112. The claim was specifically made as to two documents in a supplemental post-argument memorandum filed by the government in this court. "[W]hile the Church of Scientology has sought to have this Court order that all documents in the Clerk's custody be re-sealed, on the ground that public accessibility to these documents constitutes an invasion of Church members' privacy, the Church itself has selectively chosen to publish certain of those documents for the apparent purpose of demonstrating to that same public that the Church and its members have been victims of governmental harrassment." Supplemental Memorandum for Appellee in Nos. 79-2313 & 79-2324 at 2.

here should not have been lifted, and should continue unless on remand some substantial factors are identified which weigh in favor of public access to particular documents.

B. *Particularized Factors That May Have Weighed Against Nondisclosure*

To facilitate the proceedings on remand, we set forth below several reasons based on the documents' contents which might have been thought by the trial judge to justify his unsealing order. On this record, of course, we cannot determine whether these reasons were relied upon; our discussion of them represents merely the observations of an appellate court, and no inference should be drawn from our discussion that would conclude our review of the reasons actually given by the trial judge when the matter is again before us.

One possible reason for unsealing is that the documents were already made public through other means; the government has made this claim, at least in this court, as to some of the documents.¹¹² A second is that the documents were stolen or contraband, hence forfeitable. The government asserted below that some of these documents meet that standard.¹¹³

113. In his oral ruling denying the Church's application for temporary relief, Judge Richey stated:

[T]here has been no determination as to which of the documents in the court's custody at this time are subject to forfeiture, or may later be subject to forfeiture.

There are allegations that many of the documents were stolen from government agencies and private organizations.

No documents will be returned, or can be returned, until such a determination can be made.

Transcript of proceedings, *Church of Scientology of Cal. v. United States*, Civ.No. 79-2975, Nov. 2, 1979 at 52, Church App. Doc. 11.

However, in considering the presumptive owner's right to return of seized property this court cautioned in *United States v. Wilson*, 540 F.2d at 1104:

It goes without saying, that if the Government seeks to forfeit the property a proper proceeding should be instigated to accomplish that purpose. A claim by the owner for the return of his property cannot be successfully resisted by asserting that the property is

A third possible reason for unsealing the documents is that they are not charged, or exonerated, or admitted by the court, or even admitted by persons not involved in the proceedings or the case. In any event, copies of the documents should be made available to law enforcement agencies. It is not the policy of this court to sequester materials of this nature from the public. The activity does not constitute a crime of the defendant. The evidence is not sufficient to support a conviction, or a finding of guilt, or a sentence of imprisonment. The publication of the documents would be to the detriment of the defense. The government has merely cumulated evidence of criminal acts. The agreement was not a crime. It seems to serve the public interest if and when the documents are unsealed. Sentencing.¹¹⁵

It is, however, not the policy of this court to sequester materials of this nature from the public. The activity does not constitute a crime of the defendant. The evidence is not sufficient to support a conviction, or a finding of guilt, or a sentence of imprisonment. The publication of the documents would be to the detriment of the defense. The government has merely cumulated evidence of criminal acts. The agreement was not a crime. It seems to serve the public interest if and when the documents are unsealed. Sentencing.¹¹⁵

subject to forfeiture. The documents should be sealed (citation and original).

114. In *Nixon v. Gandy*, 418 U.S. 431, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

A third possible reason, and the most troublesome as a matter of policy, is that the documents were evidence of crimes—whether additional evidence of the crimes charged, or evidence of other crimes committed by the defendants then before the court, or even evidence of crimes committed by persons not charged in the instant proceedings or then before the court. Of course, copies of the documents can be made available by the court to appropriate law enforcement authorities; no one disputes that here. But public access is more bothersome. Wholesale public access even of materials apparently relevant to criminal activity does not allow for the safeguards of the criminal process as to what is admissible evidence and what is not.¹¹⁴ As to potential defendants not involved in the proceeding, or even as to evidence of other crimes of the same defendants, premature publication can taint future prosecutions to the detriment of both the government and the defense. If the additional evidence be merely cumulative evidence of the same criminal acts on which the disposition agreement was based, public access would seem to serve little purpose, except perhaps if and when the materials are relied upon in sentencing.¹¹⁵

It is, however, possible to conjure up exceptional cases. For example, there may be cases where massive scale crimes would go unpunished if documents were not released to permit the public to take the steps necessary to ensure prosecution. Release for this reason might be considered justifiable under circumstances where the integrity of

subject to forfeiture. If the property is subject to forfeiture, appropriate proceedings should be started expeditiously.

(citation and footnote omitted) (emphasis in original).

114. In *Nixon*, 438 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570, the tapes sought had already been carefully screened *in camera* for their relevance to the crimes charged, see *Nixon v. United States*, 418 U.S. 683, 713-716, 94 S.Ct. 3090, 3110-11, 41 L.Ed.2d 1039 (1974); *United States v. Mitchell*, 386 F.Supp. at 642, and had been introduced in evidence during trial of the charges. See note 97, *supra*.

the law enforcement process would be substantially served by permitting public access; for example, where a governmental failure to prosecute in the light of overwhelming probable cause substantially impugns the integrity of the prosecutorial function. Another circumstance where access might be thought warranted is where the remedies of grievously injured and unknowing victims would be jeopardized if the documents never entered the public domain. Whether the trial judge justified unsealing on these or other bases is unclear. We think it incumbent on him to identify the reasons for his action with respect to the particular documents at issue.

C. *Particularized Privacy Interests Which May Weigh in Favor of Denying Public Access*

To be weighed against the particularized reasons which may justify public access are the particularized privacy or other interests that the Church or the individual defendants may assert.¹¹⁶ Some of these interests have already been weighed by the trial judge.

In his order of October 30, denying reconsideration of the earlier unsealing order, Judge Richey explained:

The defendants cite instances in which documents discuss the sex lives of members of the Church, tax returns of individuals, and attorney-client material of law firms. In order to make certain that such material, which would violate rights of innocent third-parties is not released,

115. See generally Fed.R.Crim.P. 32(c)(3). But see McLaughlin, *Privacy and the Presentence Report*, 54 Ind.L.J. 347 (1979).

116. As suggested above, the potential for prejudice inherent in the documents' release must be assessed with specific reference to the documents' contents. The possibility of prejudice is thus another "particularized" interest which may be asserted to deny public access.

In the district court neither the Church nor the individual defendants attempted to itemize their interests in particular documents. Given the time constraints under which their arguments were fashioned and presented and the extremely large number of documents at issue, this is understandable.

the Court will examine the documents at issue and will keep under seal those documents or portions of documents which would result in an unwarranted invasion of privacy. Of course such an exercise will be time consuming; however, fairness requires such a procedure.¹¹⁷

The kinds of interests cited by the defendants below do not, we think, exhaust the types of particularized privacy interests that might be asserted in the supplemental proceedings, nor do we think that the privacy interests to be protected are limited to those of "innocent third-parties." Valid privacy interests might be asserted either by the Church or by the individual defendants in documents as to which they (or Church members if the Church proceeds representatively) could assert a privilege against evidentiary use¹¹⁸ or in documents which reveal the intimate details of individual lives, sexual or otherwise,¹¹⁹ whether or not they concern "innocent third parties." Other valid privacy interests might also be asserted; we do not decide now which are valid and which are not.

IV. THE PROCEDURES TO BE FOLLOWED IN THE SUPPLEMENTAL PROCEEDINGS

We contemplate that on remand the district court will review its decision to unseal the documents. In doing so, the court should bear in mind: the Supreme Court's injunction that judicial officers attempt to minimize the intrusiveness of document

searches;¹²⁰ and this court's determination, on the basis of the record now before us, that the seal on the documents at issue should be retained, absent substantial factors weighing in favor of public access.

The record does not permit us to determine how the trial judge's analysis of the generalized interests at stake differed from our own, nor whether he may have justified disclosure on the basis of the "particularized" factors we suggest or on some other basis. If, upon reconsideration in light of our analysis, the trial judge determines to abide by his unsealing order in whole or in part, the reasons relied upon should be identified in a supplemental rationale with specific reference to the particular documents or group of documents to which each reason is applicable.

This supplemental rationale should be supplied to the parties, including the Church. The defendants on their own behalf and the Church on behalf of itself and its constituent members may then, by motion for reconsideration and accompanying affidavit, contest the reasons given in the supplemental rationale and articulate any particularized privacy interest they wish to assert with respect to a document that is to be released. The district court may then grant or deny the motions in whole or in part. It may be that where both the public interest in access and the private interest in non-disclosure are strong, partial or redact-

117. *United States v. Hubbard*, Cr. No. 78-401, slip op. at 6 (Oct. 30, 1979), Hubbard App. at 228.

118. Evidentiary privileges serve to protect at least some aspects of the amorphous concept of privacy. See McCormick's Handbook of the Law of Evidence 157 (2d ed. E. Cleary ed. 1972):

[P]rivileges have survived largely unaffected by . . . [the criticisms of] eminent scholars and jurists who saw them as suppressing the truth, for it is evident that for many people, judges, lawyers and laymen, the protection of confidential communications from enforced disclosure has been thought to represent rights of privacy and security too important to relinquish to the convenience of litigants.

119. Concerning privacy tort actions against the press, Professor Emerson has suggested that protection . . . be extended only to matters related to the intimate details of a person's life: those activities, ideas or emotions which one does not share with others or shares only with those who are closest. This would include sexual relations, the performance of bodily functions, family relations, and the like.

Emerson, *The Right of Privacy and Freedom of the Press*, 14 Harv.C.R.-C.L.L.Rev. 329, 343 (1979). However, as noted earlier, he has also suggested a broader scope of protectible privacy against governmental activity. See note 44, *supra*.

120. *Andresen v. Maryland*, 427 U.S. at 482 n.11, 96 S.Ct. at 2749 n.11.

ed disclosure
Such portions of
responses ther
sideration that
of the docume
under seal. Th
proceedings sh
this court whe
orders will com

V.

We vacate t
tion and temp
pealed in Nos.
the unsealing
2312 and rema
ceedings which
the court retai
ter and orders
sealed pending
mand.

So ordered.

MacKINNO

To my mind
es privacy wit
solve this app
for clarification
grounds on w
documents intr
defendants at t
majority accom
stay forbiddin
evidentiary d
which retains
issues a furthe

121. It is in th
that we decide
ed by the facts
presents narro
dertaken to an
are acutely aw
difficulty of s
In particular, v
not decide: (1)
third party to
courtroom con
the records of
The public rig
used for any
strate on a mo
ness of the sea
substantive rig
assert a privac
pulsorily taken

*ed disclosure would satisfy both interests. Such portions of the supplemental rationale, responses thereto and any order on reconsideration that are revealing of the contents of the documents at issue should be filed under seal. The record of the supplemental proceedings should then be transmitted to this court where our consideration of the orders will continue.¹²¹

V. CONCLUSION

We vacate the orders denying intervention and temporary injunctive relief, appealed in Nos. 79-2313 and 79-2324; ¹²² stay the unsealing orders appealed in No. 79-2312 and remand the record for the proceedings which we direct. This division of the court retains jurisdiction over the matter and orders all documents here at issue sealed pending our decision following remand.

So ordered.

MacKINNON, Circuit Judge, dissenting:

To my mind the majority opinion confuses privacy with secrecy. The majority resolve this appeal by remanding the record for clarification by the district court of the grounds on which it removed the seal on documents introduced into evidence by the defendants at the suppression hearing. The majority accompanies its disposition with a stay forbidding further disclosure of the evidentiary documents until this panel, which retains jurisdiction over the appeal, issues a further order regarding them.

121. It is in the nature of our judicial process that we decide only the few questions presented by the facts of the case before us. This case presents narrow questions which we have undertaken to answer above. Nevertheless, we are acutely aware of the proximity, gravity and difficulty of several questions not answered. In particular, we wish to emphasize that we do not decide: (1) The rights of defendants or any third party to exclude the public from the courtroom conduct of a criminal case or from the records of the trial of criminal charges; (2) The public right of access to seized materials used for any purpose other than to demonstrate on a motion to suppress, the unlawfulness of the search; and (3) The procedural and substantive rights of third parties who seek to assert a privacy interest in materials not compulsorily taken from their persons or premises.

My dissent from this disposition is based on my conclusion that the disclosure was not only warranted, but required. I also find the record sufficiently detailed to support the action taken by the district court, making this remand unnecessary. Finally, I disagree with the court that the Church of Scientology of California¹ is entitled to intervene in the criminal proceedings.

I

The facts are fully set forth in the court's opinion and, except for several which bear emphasis, will not be repeated here.

The source of the documents which are the subject of this appeal was the seizure from the Church of Scientology of California, at two Los Angeles locations. Copies of the 50,000 pages seized were transmitted to Washington, D. C. for consideration by the trial court to determine the validity of the search against the contention that it was a constitutionally impermissible general search. There is no disagreement on the court that the legal effect of requesting the trial court to examine the entirety of the seized materials was that they became part of the "record" of the case. *Supra* at 299 (quotation marks in original). I agree with the factual conclusion of the majority that this reflects the contemporaneous understanding of the parties and the district court.²

122. For the reasons given, *supra*, note 63, we affirm that portion of the order appealed in No. 79-2324 which may be read to deny on the merits immediate return of the documents seized.

1. Hereinafter sometimes referred to as the "Church" or "Church of Scientology."
2. The Church of Scientology attempted to impose an "agreement" on the trial court to retain the documents under seal. If the action taken was within the parameters of the trial court's inherent power over the proceedings before it, as I conclude, then the wishes of the defendants, even if acceded to by the government, did not in any way restrain the court. Parties do not by their agreements limit the powers of the court. Nor do parties "contract" with the court, as the record reflects the criminal de-

termination, before us, at issue substantial fac- c access. us to deter- analysis of the offered from ave justified "particular- some other in light of determines to whole or in ould be iden- ale with spe- r documents each reason should be cluding the heir own be- of itself and hen, by mo- accompanying given in the ticutate any they wish to ent that is to rt may then whole or in th the public ce interest in al or redact- ns against the uggested that nded only to e details of a ideas or emo- with others or closest. This , the perform- relations, and nd Freedom of Rev. 329, 343 er, he has also tectible priva- See note 44, U.S. at 482

In the criminal proceedings involving individuals who are employees or officials of the Church of Scientology, the trial court adopted a disposition of the charges that conformed to the negotiated plea agreement. Just before rendering guilty verdicts after a bench trial, the judge ordered that all seized documents which the defendants had caused to be admitted into evidence on the earlier suppression motion, and which had not been earlier returned as unnecessary to the prosecution or used in the examination of witnesses at the suppression hearing, be made available for public inspection. Attempts to stay the disclosure were ineffective in the district court, before a motions division of this court, and before this Court *en banc*. Thereafter, the Chief Justice of the United States, acting as Circuit Justice, also denied an application for a stay. The disclosure of the documents was the question involved in such proceedings and the same issue is raised here a second time.

II

This proceeding reaches the court in a posture where the public disclosure of all the documents has continued until the present date. The majority now orders that the documents be sealed to prevent public access. Further disclosure is prohibited pending review by this court after remand. I dissent from that disposition because there is an ample factual and legal basis for the order of the district court making such evidentiary documents available as court records in the case.

A

At the outset it is essential to consider the posture of the case when the judge removed the seal from the documents. The original claim by the defendants was that the search was illegal. This claim was based upon the allegedly overbroad language of the search warrant. In this respect the search warrant in California was

defendants attempted to do. Parties legitimately, of course, make requests of the court through the medium of motions, which are applications

the same as the one in the District of Columbia which had been held to be valid. *In Re Search Warrant Dated July 4, 1977*, 572 F.2d 321 (D.C.Cir.1977), cert. denied, 435 U.S. 925, 98 S.Ct. 1491, 55 L.Ed.2d 519 (1978). In *Church of Scientology v. United States*, 591 F.2d 533 (9th Cir. 1979), cert. denied 444 U.S. 1043, 100 S.Ct. 729, 62 L.Ed.2d 729 (1980) the court noted that "A similar warrant was obtained for a search of part of a building owned by the Founding Church of Scientology in Washington, D. C. The affidavits in support of the warrants were substantially identical, and so were the warrants, except for descriptions of the premises to be searched." (Emphasis added) 591 F.2d at 533. Nevertheless, the defendants in the criminal trial continued to press the claim by a motion to suppress. When the District Court in this Circuit, Judge Richey, ruled against the suppression motion all the evidence in the seized documents, in effect, became admissible as evidence against them. Apparently recognizing the probative force of such evidence to prove their guilt the defendants shortly thereafter entered guilty pleas as follows:

- Sharon Thomas: Theft of government property—Count 17
- Gerald Bennett Wolfe: Conspiracy—Count 23
- Cindy Raymond: Conspiracy—Count 23
- Mitchell Hermann: Conspiracy—Count 1
- Richard Weigand: Conspiracy—Count 23
- Gregory Willardson: Conspiracy—Count 23
- Duke Snider: Conspiracy—Count 23
- Henning Heldt: Conspiracy—Count 23
- Mary Sue Hubbard: Conspiracy—Count 23

Thus, the ruling on the motion to suppress effectively caused the disposition of the case and under normal court procedures the record upon which the court ruled would become available to the public almost as a matter of course. A different situation would exist if the seized documents had not

for an order. That should not be confused with a power to dictate the actions of the court.

been introduced had—all of the the document seal "for the search and se were admitted vant for that that such do search to be u are at the cor ing the suppre ary and ordin ord to disclose ruling. And t that since the lawful, and th by the defend unlawful, that the court ruled

Additionally that the Chur from the defe

Individ

Hennin

Duke S

Richar

Gregory

Mitchel
a/k/a

been introduced into evidence, but they had—all of them. The Church contends that the documents had been introduced under seal “for the purpose of showing that the search and seizure was *unlawful*.” They were admitted by the court as being *relevant* for that purpose. But the court ruled that such documents did *not* prove the search to be *unlawful*. The documents thus are at the core of the court’s decision denying the suppression motion and it is customary and ordinary in such cases for the record to disclose the evidentiary basis for the ruling. And there is nothing to the point, that since the court ruled the search was *lawful*, and the documents had been offered by the defendants to prove the search was *unlawful*, that the documents upon which the court ruled may not be disclosed.

B

Additionally, there is nothing to the point that the Church has a different interest from the defendants. *The individual de-*

fendants were not acting for themselves. They were acting for the Church. As charged in the indictment the Church of Scientology was organized with “a department known as the ‘Guardian’s Office’ [which] had responsibility to promote the interests of Scientology by *covertly* identifying, locating, and obtaining all Scientology-related information in the possession of various individuals, government agencies and private organizations. Each of the Guardian Offices was composed of five bureaus including the Information Bureau which was assigned the responsibility for the conduct of *covert* operations including the collection of data and documents of interest to Scientology.” (Emphasis added).

Individual defendants, including the wife of the head of the world wide Church, held official positions in the Guardian Office, United States, of the Church of Scientology as listed below in the column entitled “Positions”.

Individuals	Approximate Periods	Positions
Henning Heldt	Nov. 21, 1973– June 20, 1977	Deputy Guardian US (DG US)
Duke Snider	March 1974– Dec. 1, 1974	Deputy Guardian— Information US (DG I US)
	Dec. 1, 1974– June 20, 1977	Deputy-Deputy Guardian US (DDG US)
Richard Weigand	Dec. 1, 1974– May 15, 1977	Deputy Guardian— Information US (DG I US)
Gregory Willardson	Sometime 1974– Jan. 1, 1976	Information Bureau Branch I Director US
	Jan. 1, 1976– June 16, 1977	Deputy-Deputy Guardian Information US (DDG I US)
	June 16, 1977– June 20, 1977	Deputy Guardian Information US (DG I US)
Mitchell Hermann a/k/a Mike Cooper	Jan. 1, 1974– March 1, 1975	Branch I Director, Guardian’s Office, DC
	Jan. 1, 1976– March 1, 1977	Southeast US Secretary, Guardian’s Office, US (SEUS SEC.)

Individuals	Approximate Periods	Positions
Cindy Raymond	June 1, 1974– Jan. 1, 1976	Information Bureau Collections Officer US
	Jan. 1, 1976– Sept. 1, 1976	Information Bureau Branch I Director US
	Sept. 1, 1976– June 20, 1977	Information Bureau National Secretary US
Gerald Bennett Wolfe	Nov. 18, 1974– June 30, 1976	Covert Operative for Guardian Office in Internal Revenue Service
Mary Sue Hubbard	Nov. 21, 1973– May 27, 1977	Controller and Commodore Staff Guardian (CSG) supervising Guardian Office
Sharon Thomas	Feb. 29, 1976– Nov. 5, 1976	Covert Operative for Guardian Office in Department of Justice

The offense alleged in the first count to which Hermann plead guilty was an unlawful conspiracy "to commit offenses against the United States of America, that is, by various illegal and unlawful means, to locate and obtain illegally information and documents in the possession of the United States of America which were related to Scientology and to individuals, organizations and agencies perceived to be enemies of Scientology."

The conspiracy alleged in count 23 to which six (6) other officials of the Church of Scientology plead guilty had as its alleged objectives:

(a) to obstruct justice in violation of Title 18, United States Code, Section 1503;

(b) to obstruct a criminal investigation in violation of Title 18, United States Code, Section 1510;

(c) to harbor and conceal a fugitive from arrest in violation of Title 18, United States Code, Section 1071;

(d) to make false declarations in violation of Title 18, United States Code, Section 1623;

Thus, most of the defendants were *principal officers* of the Church and it was their activities as official "Guardians of the

Church that generated most of the documents in question. That is the nature of the charges against the defendants and their guilty pleas are sufficient substantiation of the basic charges as the court noted in its order of December 7, 1979: "Each of the five defendants has admitted his or her guilt in open court. Moreover, never has this Court been faced with such overwhelming evidence of guilt." (JA 243).

Moreover, a corporation is responsible for the acts of its officers and agents committed within the scope of their authority. *E. g., United States v. Sherpix*, 512 F.2d 1361, 1367 n. 7 (D.C.Cir.1975) I would thus not find the Church to have any separate interest in the seized documents. In addition some of the documents were admittedly stolen. Actually both the Church's officers and the Church have the same intent—concealment of the same improper activity.

C

Had not the trial judge ordered the release of the documents the complaint would have been loudly asserted that he had unconstitutionally restricted access to an essential basis for his decision in violation of the First Amendment. The important public interest in assuring the proper conduct of judicial proceedings would also have been

compromised by a case where integral part of a motion to suppress record, there would determine the ruling denying lawfulness. A word, vital public been involved judicial proceeding available for public trial judge would either action sealed documents. In my was to remove the court four ants' claim that

Judicial proceeding society. Indeed requires that proceeding be court, and the cases, the proceeding with severely as in this case been effective was to the court adverse public defendants who open proceeding *Pasquale*, 443 L.Ed.2d 608 (ants' guilty plea to their criminal documents.

This leaves harm to the premises the ing from di That, in turn, against the policies favor

The Church asserts that the church building

3. There is the right to inter

compromised by retaining a sealed record in a case where the materials had been an integral part of a judicial determination on a motion to suppress. Absent unsealing the record, there would have been no means to determine the basis for the trial court's ruling denying the defendant's claim of unlawfulness. Absent unsealing of the record, vital public information which had been involved in a serious and important judicial proceeding would have been unavailable for public inspection. In short, the trial judge was placed in a position where either action he elected in regard to the sealed documents would have been criticized. In my view, the only proper action was to remove the seal on the documents the court found *not* to support the defendants' claim that the search was unlawful.

D

Judicial proceedings are not secret in our society. Indeed, the judiciary scrupulously requires that all participants in a judicial proceeding be given equal access to the court, and that, particularly in criminal cases, the proceedings be open to the public, with severely limited exceptions. Where, as in this case, the criminal proceedings had been effectively completed, and the trial was to the court, there was no danger of adverse publicity affecting the rights of the defendants which might militate against an open proceeding. See *Gannett Co., Inc. v. Pasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979). Moreover, the defendants' guilty pleas had resolved all doubt as to their criminal conduct as reflected in the documents.

This leaves us with the question of the harm to the petitioning party, from whose premises the documents were seized, resulting from disclosure of the documents.³ That, in turn, must necessarily be balanced against the harm to the important public policies favoring disclosure.

The Church of Scientology of California asserts that the seizure of documents from church buildings in Los Angeles necessarily

3. There is the additional issue of the Church's right to intervene in a pending criminal pro-

demonstrates a sufficient interest in the question of the validity of the search to entitle the Church to intervene in the pending criminal proceeding involving only individual defendants. That contention has some appearance of reasonableness, but it does not withstand scrutiny.

Any assessment of the correctness of the trial court's action must acknowledge the fact that a number of the documents quite simply do not belong to the Church of Scientology of California in the first place. Indeed, certain of the documents belong to others and were obtained through illegal means. In addition to United States Government documents admittedly stolen from the Department of Justice (Count 17), an *amicus curiae* brief filed in this court on behalf of two Florida newspapers states that certain of the documents belong to it, and were stolen from its lawyers. The newspapers have waived all privacy rights in the materials. *Brief for Amici Curiae Times Publishing Co., and Clearwater Newspapers, Inc.* at 5. This waiver does not in itself resolve the issue involved in this appeal but it serves to identify some of the documents and to emphasize that the Church of Scientology wants secrecy not privacy. These two concepts are related only in the result they effectuate; their motivations are decidedly different.

The court by ordering this remand, and reimposing a seal, is ordering secrecy, despite its recognition of the "country's tradition of access to records of a judicial proceeding." This issue is best resolved by reference to the decision in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-98, 98 S.Ct. 1306, 1311, 55 L.Ed.2d 570 (1977) where the Supreme Court addressed the question of access to court records:

"It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.

ceeding. That question is addressed in part III of this dissent, *infra*.

"It is uncontested, however, that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes.

"It is difficult to distill from the relatively few judicial decisions a comprehensive definition of what is referred to as the common-law right of access or to identify all the factors to be weighed in determining whether access is appropriate. The few cases that have recognized such a right do agree that the *decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.*"

(footnotes omitted) (emphasis added).

The Supreme Court has recently affirmed the public nature of criminal trials. In his opinion for the Court, in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980), the Chief Justice stated "a presumption of openness inheres in the very nature of a criminal trial under our system of justice." at 573, 100 S.Ct. at 2825. In *Richmond Newspapers* the Supreme Court held that the public has a First Amendment right to attend a criminal trial, except in extraordinary circumstances where a closed proceeding is necessary to assure the defendant a fair trial.

Collectively, these decisions establish the clear and historically based presumption favoring public trials. The record of a trial is no less a part of the proceeding than the actual examination of witnesses. Where, as here, the controversy presented to the court was limited to a single major issue—the validity of the search—and where the defendants contended that their claim of *invalidity* was proven by *all* the documents they caused to be admitted into evidence, making the documents available in the public record becomes even more important. Absent such access, the public's opportunity to assess the validity of the courts ruling as applied to these criminal defendants would

be virtually nonexistent. (1) The central issue in the suppression proceedings, and (2) the factual basis for the acceptance of the plea bargain agreement, would be obscured from the public and the press. The confidence of the public in the judicial process, and the constitutional right of access to criminal proceedings, requires upholding the action of the trial court in this case.

The requirement for public *disclosure* of the evidentiary record in a court proceeding which results in a judicial ruling naturally flows from the constitutional requirement that the trial be public. Even though a motion to suppress may not be a "trial" there is no difference in the ultimate requirement that the *record* be public. A judicial proceeding cannot be said to be public if the public be denied access to the evidence admitted as relevant to the issues before the court. *It is as important to public disclosure of judicial proceedings that the public be able to read written evidence in the record as it is that they be able to hear oral testimony.*

One objective of a public trial of universal benefit to the public and defendants is that it prevents justice from being administered covertly or based on "secret bias or partiality." *Id.*, p. 569, 100 S.Ct. p. 2823. It also protects judges from being improperly charged with bias, corruption or misapplication of the law. Had the motion to suppress been granted there is no question that the evidentiary record would have been available to the public, and it is just as available when the motion is denied.

The majority states that it cannot determine from the trial judge's orders what factors entered into the decision to unseal, or whether he had appropriately balanced the generalized interests. The record does not support such criticism. The trial judge made explicit reference to his reasoning at the time he ordered the unsealing. The Court's order of October 25, 1979 stated: [T]his Court firmly believes that there is a right in the public to know what occurs before the courts. In addition, there is a public interest in access to Court records. As Justice Brandeis once said, sunshine is the best disinfectant. (JA 171)

Regardless of right "to know best disinfectant" "there is a public records" is a adequate basis for have been stated right in access *Richmond Newspapers* ingly follow:

the settled decision of a firm if the lower ground or *Green v. G*

Securities and Chenery Corp. 459, 87 L.Ed. S.Ct. 154, 15

Necessarily the court was documents and which were done. Following personal documents involved in the unsealed to public. The assertion did not thoroughly their entirety and is a complete since the court edged the need entirety despite of the review.

On remand Scientology of participate as such action is

4. In a memorandum filed in response to reconsideration judge expressed his opinion hearing Los Angeles defendants." (national) That sentence to the material relating to the Church, t

Regardless of the references to the public right "to know" and sunshine being "the best disinfectant", the statement that "there is a public interest in access to Court records" is a correct statement and an adequate basis for decision. In fact, it could have been stated more forcibly as a "public right in access to Court records." Cf., *Richmond Newspapers, supra*. I would accordingly follow:

the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct "although the lower court relied upon a wrong ground or gave a wrong reason." *Heller v. Gowan*, 302 U.S. 238, 245, 58 S.Ct. 154, 158, 82 L.Ed. 224.

Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80, 88, 63 S.Ct. 454, 459, 87 L.Ed. 626 (1943).

Necessarily inherent in the unsealing by the court was its decision to review the documents and specifically exclude those which were highly personal. This was done. Following the extraction of such personal documents the remaining documents involved in the suppression decision were unsealed to place them in the public record. The assertion that the learned trial judge did not thoroughly review the documents in their entirety is unsupported by the record, and is a complete unjustifiable assumption since the court's order explicitly acknowledged the need to examine the record in its entirety despite the time intensive nature of the review.⁴

III

On remand of this case, the Church of Scientology of California will be allowed to participate as an intervenor. In my view such action is incorrect because it interferes

4. In a memorandum dated October 30, 1979, filed in response to the defendants motion for reconsideration of the unsealing order the trial judge expressly stated that during the suppression hearing "all of the documents seized in Los Angeles were put into evidence by the defendants." (JA 223, 224) (emphasis in original) That same order makes an explicit reference to the need to review the entirety of the material relating to "sex lives of members of the Church, tax returns of individuals, and at-

with a pending criminal case, and because the Church's claim regarding the documents can be made in other proceedings.

By definition, the parties to a criminal proceeding are the government and the defendants. By definition, the issues in a criminal proceeding are concerned with the guilt or innocence of the defendants. While other issues ancillary to that central question of criminal responsibility are often involved, it is essential that pending criminal cases not be inhibited by the resolution of issues remote from the main case, particularly those involving parties other than the government and the criminal defendants. *E. g., In the Matter of An Application for a Search Warrant of Wiltron Associates, Ltd.*, 49 F.R.D. 170, 172 (S.D.N.Y.1970).

The Church of Scientology is entitled to bring an action posited on the federal court's general supervisory power over federal law enforcement officials for a return of the property, or it may make application in the court where the criminal proceedings were pending. *United States v. Wilson*, 540 F.2d 1100, 1104 (D.C.Cir.1976). These provide sufficient alternatives so that intervention in a pending criminal case should not be allowed. The majority is creating an unfortunate precedent which will unnecessarily obstruct criminal trials and greatly increase the already difficult case load which federal district courts must process. Accordingly, I dissent from allowing the Church of Scientology of California to intervene in a pending criminal proceeding to litigate its asserted interest in the seized documents.

IV

This appeal will again be before this panel after the learned trial judge has, in ac-

torney-client material of law firms." JA 228. The final paragraph of the memorandum states that it is

"Further Ordered, that the seal shall remain on documents not used by the parties for examination of witnesses at the suppression hearing until the Court examines each in light of issues raised by the defendants, and, the Court will begin such process today." JA 228 (emphasis added).

cordance with the court's opinion, explicated any *additional* reasons he may have had for removing the seal, and performed whatever further documentary review is required. Because the appeal is resolveable as it is presented to us, I respectfully dissent from the remand ordered by the court. Because in my view the court acted properly in opening the record to the public, I dissent from the sealing of the evidentiary documents. And because the trial court correctly denied the Church of Scientology of California leave to intervene in a pending criminal proceeding to assert collateral issues I dissent from the court's disposition of the remand issue.

MEMORANDUM

Opinion After Remand

In *United States v. Hubbard*, 650 F.2d 293 (D.C.Cir. 1980), this court ordered this case remanded to the district court for "review [of] its decision to unseal the documents" at issue in light of "this court's determination, on the basis of the record now before us, that the seal on the documents at issue should be retained, absent substantial factors weighing in favor of public access." *Id.*, at 324. We left open to the district court the option of abiding by its original order in whole or in part. However, we mandated that this result be accompanied by an expanded record. Any decision ordering the unsealing of documents was to include an explanation in a "supplemental rationale" of "how the trial judge's analysis of the generalized interests at stake differed from our own, [and] whether he may have justified disclosure on the basis of the 'particularized' factors we suggest or on some other basis as well as . . . with specific reference to the particular documents or groups of documents to which each reason is applicable." *Id.* at 324. This rationale was to be supplied to the parties, including the Church, to enable them to file a motion for reconsideration in which they might contest its findings or offer evidence

of particularized privacy interests in the involved documents. We postponed our final ruling on the original appeal from the unsealing order until such time as the district court ruled on these motions and transmitted the record of the supplemental proceedings to this court. *Id.*, at 324-325.

On remand, the trial judge who had issued the original order unsealing the documents reaffirmed the original reasons given for his order in a supplemental memorandum opinion issued on October 15, 1980. *United States v. Hubbard*, Crim. No. 78-401 (D.D.C. Oct. 15, 1980). Although the trial judge wrote that he "perceives no particularized reason for the release of the documents, other than those stated in the unsealing order," see *id.*, slip op. at 3, he both restated several general reasons for his decision to release the entire group of documents at issue, and presented apparently particularized justifications for the release of individual documents or groups of documents. See *id.*, slip op. at 4. However, he failed to identify the documents or groups of documents to which these particularized justifications applied. See *id.* The record was then transmitted to this court.

On October 30, 1980, the trial judge recused himself from participation in any further proceedings in this case.

On November 5, the district judge assigned to the case after the first judge's recusal filed an order stating that because he had no "knowledge regarding the trial judge's determination that disclosure of the documents under seal was warranted, . . . [he] is in no position to 'supplement' his rationale[.]" *Church of Scientology v. United States*, Civ. No. 79-2975, slip op. at 2 (D.D.C. Nov. 5, 1980). Stating further that "this court perceives no 'substantial factors' favoring disclosure," he concluded:

Upon consideration of the generalized and particularized privacy interests in the instant case, this Court can only conclude that the documents in question must remain under seal "until the evidentiary

utility of the
ed."

Id.

No motions
peals have be
November 5th
Both appellan
memoranda w
the earlier supp
inal trial judge
documents con
and appellees u
record provide
their unsealing
the original ap
der on the bas
supplemented
issued by the t

Our original
the reasons for
district court t
cations for the
ments or categ
mand required
tions in fact c
unseal, then th
documents to
identified. In
original trial j
additional rea
those set out
several particu
reference to
groups of doc
any such iden
nor the parties
address the
Thus, the pur
fulfilled. If h
would therefo
mand this cas
the district cou
the review wh
tify the docu
judge's appare
tion pertain, h
to do so.

The subsequ
of the second j
he has decide

utility of the seized documents is exhausted."

Id.

No motions for reconsideration nor appeals have been filed subsequent to the November 5th order of the district court. Both appellants and appellees have filed memoranda with this court responsive to the earlier supplemental opinion of the original trial judge, appellants urging that the documents continue to be kept under seal, and appellees urging that the supplemental record provides a sufficient rationale for their unsealing. We consequently decide the original appeal from the unsealing order on the basis of the original record as supplemented by the memoranda and order issued by the two district judges.

Our original remand, designed to clarify the reasons for release, did not *require* the district court to state particularized justifications for the release of individual documents or categories of documents; our remand required instead that if such justifications in fact contributed to the decision to unseal, then the reasons be stated and the documents to which they are applicable be identified. In his supplemental opinion, the original trial judge, though disclaiming any additional reasons for release other than those set out in his original order, set out several particularized justifications without reference to identifiable documents or groups of documents. In the absence of any such identification, neither this court nor the parties concerned can meaningfully address the stated reasons for release. Thus, the purpose of the remand was not fulfilled. If he had not recused himself, we would therefore have been forced to remand this case again, stressing that while the district court is not *required* to conduct the review which may be necessary to identify the documents to which the trial judge's apparently particularized justification pertain, he should have the opportunity to do so.

The subsequent memorandum and order of the second judge, however, indicates that he has decided not to conduct any such

review, as he perceives no substantial factors, generalized or particularized, favoring disclosure. Instead, he has ordered that the documents remain under seal until their evidentiary value is exhausted.

In light of this new determination, this court now enters a final judgment, in accordance with the rationale stated in our earlier opinion, reversing the original unsealing order from which the appeals were taken, and remanding the case to the district court for reentry of an order similar to the order of November 5 maintaining the documents under seal. Upon entry of such order our stay of the original unsealing order will be automatically vacated.

MacKINNON, Circuit Judge (dissenting): I dissent from the order sealing the record in this case. My reasons are stated extensively in my dissent, *supra* at 325. In short, in my view, the decision was within the discretion allotted to the trial judge and conforms to that "presumption of openness [which] inheres in the very nature of a criminal trial under our system of justice." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980). The availability of the documents in question to public scrutiny is fully supported by the principle that the public should have access to the testimony and written evidence in the record upon which the court relied in making its decision. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-98, 98 S.Ct. 1306, 1311-12, 55 L.Ed.2d 570 (1977).



PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) years and not a party to the within action. My business address is 6255 Sunset Boulevard, Suite 2000, Los Angeles, CA 90028.

On January 23, 1995, I served the foregoing document described as DECLARATION OF LAURIE J. BARTILSON IN SUPPORT OF CHURCH OF SCIENTOLOGY INTERNATIONAL'S EX PARTE APPLICATION FOR AN ORDER STRIKING ARMSTRONG'S LATE-FILED SUPPLEMENTAL DECLARATION IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION OF THE FOURTH, SIXTH AND ELEVENTH CAUSES OF ACTION OF SECOND AMENDED COMPLAINT, OR, IN THE ALTERNATIVE, FOR AN ORDER SEALING EXHIBITS A AND M TO SAID DECLARATION on interested parties in this action,

[] by placing the true copies thereof in sealed envelopes as stated on the attached mailing list;

[X] by placing [] the original [X] true copies thereof in sealed envelopes addressed as follows:

FORD GREENE
HUB Law Offices
711 Sir Francis Drake Blvd.
San Anselmo, CA 94960-1949

[x] BY FAX AND MAIL

[] *I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

[] As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party

served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

Executed on January 23, 1995 at Los Angeles, California.

[] **(BY PERSONAL SERVICE) I delivered such envelopes by hand to the offices of the addressees.

Executed on _____ at Los Angeles, California.

[X] (State) I declare under penalty of the laws of the State of California that the above is true and correct.

[] (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Print or Type Name

Signature

* (By Mail, signature must be of person depositing envelope in mail slot, box or bag)

** (For personal service signature must be that of messenger)

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) years and not a party to the within action. My business address is 6255 Sunset Boulevard, Suite 2000, Los Angeles, CA 90028.

On January 23, 1995, I served the foregoing document described as DECLARATION OF LAURIE J. BARTILSON IN SUPPORT OF CHURCH OF SCIENTOLOGY INTERNATIONAL'S EX PARTE APPLICATION FOR AN ORDER STRIKING ARMSTRONG'S LATE-FILED SUPPLEMENTAL DECLARATION IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION OF THE FOURTH, SIXTH AND ELEVENTH CAUSES OF ACTION OF SECOND AMENDED COMPLAINT, OR, IN THE ALTERNATIVE, FOR AN ORDER SEALING EXHIBITS A AND M TO SAID DECLARATION on interested parties in this action,

by placing the true copies thereof in sealed envelopes as stated on the attached mailing list;

by placing the original true copies thereof in sealed envelopes addressed as follows:

MICHAEL WALTON
700 Larkspur Landing Circle
Suite 120
Larkspur, CA 94939

BY MAIL

*I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party

served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

Executed on January 23, 1995 at Los Angeles, California.

**** (BY PERSONAL SERVICE)** I delivered such envelopes by hand to the offices of the addressees.

Executed on _____ at Los Angeles, California.

(State) I declare under penalty of the laws of the State of California that the above is true and correct.

(Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Print or Type Name

Signature

* (By Mail, signature must be of person depositing envelope in mail slot, box or bag)

** (For personal service signature must be that of messenger)